Supreme Court, U.S.
FILED

961799 MAY 13 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1996

GEORGE F. REIDY, TONI E. REIDY,
TERRENCE M. REIDY, JOHN A. REIDY,
BRIAN J. REIDY, AND GEORGE M. REIDY,
Petitioners,

v.

TRAVELERS INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FREDERICK T. GOLDER
BERNSTEIN, GOLDER & MILLER, P.A.
230 BROADWAY, SUITE 104
LYNNFIELD, MASSACHUSETTS 01940
(617) 592-4000

Counsel for Petitioners

66pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in determining that "the district court lacked jurisdiction over the employment-based discrimination claims" by finding as a fact that no formal complaint was received by the state fair employment agency.

2. Whether the Court of Appeals erred in determining as a fact that a formal complaint was not presented to the state fair employment agency within six months of the discriminatory act.

3. Whether the Court of Appeals incorrectly interpreted Massachusetts Law, Andrews v. Arkwright Mutual Insurance Company, 423 Mass. 1021 (1996), by holding that "Massachusetts courts have no jurisdiction over employment-discrimination claims unless the plaintiff-employee has filed a formal complaint with the Massachusetts Commission Against Discrimination ("MCAD") within six months of the alleged discriminatory act."

3. Whether the decision of the district court is contrary to precedent of the Supreme Court.

4. Whether the district court erred by not deciding the evidence in a light most favorable to Reidy.

5. Whether the district court erred in determining as a fact that Reidy was not a qualified handicapped person.

6. Whether the district court erred by determining that in order to prevail, Reidy had to prove "that he was terminated solely because of his handicap."

7. Whether the district erred in determining that because "the plaintiff did not wait 90 days before filing the instant lawsuit in Massachusetts Superior Court on October 7, 1991," the complaint must be dismissed for failure "to follow the proper administrative procedures."

8. Whether the district court erred in deterring that Travelers provided Reidy a reasonable accommodation.

LIST OF PARTIES

Petitioners, George F. Reidy ("Reidy"), Toni E. Reidy, Terrence M. Reidy, John A. Reidy, Brian J. Reidy, and George M. Reidy respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 13, 1997. A petition for rehearing was denied on March 3, 1997.

TABLE OF CONTENTS.

Questions presented i
List of parties ii
Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement of the case 3
Reasons for granting the writ 17

I. The Court of Appeals erred in determining that "the District Court lacked jurisdiction over state employment-based discrimination claims" in their finding of fact that no formal complaint was received by the state Fair Employment Agency 17

II. Genuine issues of material fact exist as to Reidy's state claims for breach of 19

III. Genuine issues of material fact exist as to Reidy's state claims for age and handicap discrimination 23

IV. Reidy has set forth sufficient facts to establish claims for loss of consortium and loss of nurture 26

Conclusion 28
Appendix 30

Table of Authorities Cited

CASES.

Andrews v. Arkwright Mutual Insurance Company, 423 Mass. 1021 (1996) ..... i, 16, 18

Attorney General v. Bailey, 386 Mass. 367 (1982) 13

Blare v. Husky Molding Systems, Inc. , 419 Mass. 437 (1995) 21, 23

Brewster v. Martin Marietta Aluminum Sales, Inc. , 378 NW2d 558 (1985) 20

Bultemeyer v. Ft. Wayne Community Schools, 100 F. 3d 1281, 6 AD (BNA) Cases 67 (7th Cir. 1996) ... 25

Butler v. Department of the Navy, 585 F. Supp. 1063 (D. Md. 1984) 25

Carnig v. Carr, 167 Mass. 544(1897) 20

Christo v. Edward G. Boyle Insurance Agency, Inc., 402 Mass. 815(1988) 16

College-Town Division of Interco, Inc. v. MCAD, 400 Mass. 156 (1987) 21

Comey v. Hill, 387 Mass. 11 (1982) 27

Commonwealth v. Crosscup, 369 Mass. 228 (1975) 16

Crane v. Lewis, 551 F. Supp. 27 (D. D. C. 1982) 25

Daniell v. Boston Maine R. R. , 187 Mass. 337 (1903) 20

Diaz v. Eli Lilly and Co. , 364 Mass. 153 (1973) ... 26, 27

Table of Authorities Cited (Cont'd)

Diggs v. Pepsi Cola Metropolitan Bottling Co. , 861 F. 2d 914 (6th Cir. 1984) 20

Eide v. Kelsey-Hayes Co. , 431 Mich. 26, 247 NW2d 488, 47 FEP (BNA) Cases 1050 (Mich. 1988) . . . 27

Erie R. R. v. Tompkins, 304 U. S. 64 (1938) 13, 22

Fenton v. Federal Street Bldg Trust, 310 Mass 610 (1942) 20

Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507 (1980) 26, 27

Foley v. Matulewicz, 17 Mass. App. Ct. 1004 (1984) 13

Garrity v. Valley View Nursing Home, Ind. , 10 Mass. App. Ct. 822 (1980) 20

Goldhor v. Hampshire College, 25 Mass. App. Ct. 716 (1988) 20

Gram v. Liberty Mutual Inc. Co. , 384 Mass. 659 (1981) 20

Hobson v. McLean Hosp. Corp. , 402 Mass. 413 (1988) . . . 20

Hub Associates v. Goode, 357 Mass. 449 (1970) 13

Kelley v. Rossi, 395 Mass. 659 (1985) 13

Kirkley v F.H. Roberts Co., 268 Mass. 246 (1929) 20

Kravitz v. Merchants Distributors, Inc. , 387 Mass. 457 (1982) 20

Table of Authorities Cited (Cont'd)

Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761 (1986) 22

Mahoney v. Hildreth Rogers Co. , 332 Mass. 496 (1955) 20

Mantolete v. Bolger, 767 F. 2d 1416 (9th Cir. 1985) 25

Maynard v. Royal Worcester Corset Co. , 200 Mass. 1 (1908) 20

McNely v. Ocala Star-Banner Corp. , 6 AD (BNA) Cases 78 (11th Cir. 1996) 26

Milnikel v. Mercy-Memorial Med. Center, 183 Mich. App. 221, 454 NW2d 132, 53 FEP (BNA) Cases 908 (Mich. App. Ct. 1989) 27

O'Brien v. New England Telephone and Telegraph Co. , 422 Mass. 686 (1996) 14, 19, 21

Pavadore v. School Committee of Canton, 19 Mass. App. Ct. 943 (1985) 20

Pearson v. John Hancock Life Ins. Co. , 979 F. 2d 254 (1st Cir. 1992) 19

Pine River State Bank v. Mettille, 333 NW2d 622 (1983) 20

Prewitt v. United States Postal Service, 662 F. 2d 292, 308 (5th Cir. 1981) 25, 26

Table of Authorities Cited (Cont'd)

Reese v. Sears, Roebuck Co. , 107 Wash 2d 563, 731 P. 2d 4973, 51 FEP (BNA) Cases 784 (Wash. 1987) . . . 27

Smith College v. MCAD, 376 Mass. 221 (1978) 22

Smith v. Graham Refrigeration Products, Co. , Inc., 333 Mass. 181, 186 (1955) 21

Smith v. Massimiano, 414 Mass. 81 (1993) 13

Toussaint v. Blue Cross Blue Shield, 292 NW2d 880 (1980) 20

Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981) 22, 23

Villecco v. General Electric Company, 8 MDLR 1010 (1986) 25

Wheelock College v. MCAD, 371 Mass. 130 (1976) 22

Wilkerson v. Wells Fargo Bank, 212 Cal. App. 3d 1217, 4 IER Cases (BNA) 831 (Col. 1989) 20

Woods v. Friction Materials, Inc. , 30 F. 3d 255 (1994) 21

Woolley v. Hoffman-LaRoche, Inc. , 491 A. 2d 1257 (1985) 20

CONSTITUTIONAL PROVISIONS.

U. S. Const. amend. VII 2

Article IV, §1 2

Table of Authorities Cited (Cont'd)

Statutes and Rules

28 U. S. C. § 2101 (c) 1
28 U. S. C. § 1254(1) 1
28 U. S. C. § 1332 2
Sup. Ct. R. 13. 1 1

Massachusetts General Laws

c. 151B, §4(4) 2
c. 151B, §4(4A) 2
c. 151B, §4(5) 2
c. 151B, §4(16 . . . . . 2, 26
c. 151B, §1(17) 3

Rule 56(c) Mass. R. Civ. Pro. 13

No.

IN THE

Supreme Court of the United States

October Term, 1996

GEORGE F. REIDY, TONI E. REIDY,
TERRENCE M. REIDY, JOHN A. REIDY,
BRIAN J. REIDY, AND GEORGE M. REIDY,
Petitioners,

v.

TRAVELERS INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is unreported (App. A at 1A). The Judgment and Memorandum and Order of the United States District Court for the District of Massachusetts, issued on June 3, 1996, is reported at 928 F. Supp. 98 (D. Mass. 1996)(App. B at 6A).

JURISDICTION

The Court of Appeals entered its judgment on February 13, 1997, and denied a petition for rehearing on March 3, 1997. This petition is timely filed within ninety (90) days of that entry. 28 U.S.C.§ 2101(c); Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article IV, §1 of the Constitution provides in pertinent part: "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

2. The Seventh Amendment to the United States Constitution provides in pertinent part: "In suits at common law, with a value in controversy shall exceed twenty ($20.00) dollars, the right of trial by jury shall be preserved."

3. Title 28, United States Code, §1332 provides in part: "The District Court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between - (1) citizens of different states."

4. General Laws c. 151B,§4 provides in pertinent part: "It shall be an unlawful practice:

> 4. For any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under Section 5.
>
> 4A. For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right guaranteed or protected by this Chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this Chapter."
>
> 5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this Chapter, or to attempt to do so.
>
> 16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, re-hire

> or advance an employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undo hardship to the employer's business.

5. General Laws c. 151B,§1(17) provides in pertinent part: "The term 'handicap' means (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; (c) being regarded as having such impairment."

STATEMENT OF THE CASE

Procedural History

George F. Reidy ("Reidy"), originally filed this suit in the Massachusetts Superior Court for the county of Worcester, against his former employer, Travelers Insurance Company ("Travelers"), claiming a breach of the employment contract, age discrimination and handicap discrimination in violation of Massachusetts General Laws c. 151B and Massachusetts General Law c. 93, §103, and claims by his wife, Toni E. Reidy, for loss of consortium, and his children, Terrence M. Reidy, John A. Reidy, Brian J. Reidy, and George M. Reidy, for loss of nurture. It was removed to the District Court based on diversity of citizenship.

Travelers moved for summary judgment on or about July 18, 1995, as to all claims on the basis that there was no genuine issue of material fact and that Travelers should prevail as a matter of law.

After hearing, the district court on June 3, 1996, rendered its Memorandum and Order determining that there were no material issues of fact in dispute, and that Travelers was entitled to judgment as a matter of law, and entered judgment on June 3, 1996, as to all claims. Reidy filed a timely appeal from the judgment.

Reidy, his wife, Toni E. Reidy, and his children, Terrence M. Reidy, John A. Reidy, Brian J. Reidy, and George M. Reidy, filed a notice of appeal to the United States Court of Appeals for the First Circuit on June 25, 1996. The Court of Appeals entered judgment on February 13, 1996, affirming the district court decision, but on different grounds. A petition for rehearing was filed and denied on March 3, 1997.

Factual Background

Reidy began his employment with Travelers in August 1967, as an outside claim representative. As a result of his professional competence and performance, Reidy was promoted to Assistant Supervisor of the P.I.P. Unit in 1971. As a result of his professional competence and performance, Reidy was promoted to Supervisor and Unit Head of the Subrogation Unit in 1973. Reidy always received above-average annual appraisals.

While Reidy was Head of the Subrogation Department from 1973 until 1985, the department never missed a year end major goal, and the Subrogation Unit always had excellent results. Reidy went away on vacation and returned in late August 1987, at which time he was relieved of his duties as Unit Head Supervisor of the Subrogation Department, without any valid reason, and was assigned to the Auto Damage Unit performing the function of a claims representative, a demotion but one without loss of title or salary.

From the beginning of his transfer to the Auto Damage Unit, Reidy received a full case load, even though in his eighteen (18) years he never directly handled that type of claim.

Although Reidy requested help, he received minimal help from his immediate supervisor, Terry Stachura ("Stachura"), and rarely received any advise from Stachura regarding auto damage claim handling and the mechanics of handling the files.

When Reidy was on vacation or was out sick, no one, including Stachura, ever did any more than minimal work on his files, if that. During the period that Reidy was assigned to the Auto Damage Unit, he received approximately 50-60 telephone calls each day, and of those calls, 5-10 calls would be in reference to files in the Subrogation Unit which Reidy formally handled. Although Reidy requested that the problems regarding the responsibility codes be changed, no changes were ever made, and the problems and situations were never rectified.

Reidy contends that Travelers intentionally and systematically caused Reidy to have excessive case loads, under staffing, and a stressful atmosphere to force Reidy out. Reidy's work load was so heavy and demanding, that he could easily be subjected to complaints about the quality of his work. Reidy was working late hours in the office and was also forced to take work home in order to complete the work. Reidy had a work load that was three and one half times the recommended high guidelines for Travelers.

Reidy always performed his work in a fully competent and professional manner, and if there were any problems concerning his work performance, it was not as a result of his failure to perform to his best ability, but it was rather the fact that the work load was so heavy, that no one could perform it successfully. Reidy contends that Travelers is engaged in a pattern or practice of discriminating against older workers by increasing their work load beyond their ability to perform it successfully, and that there were a number of employees over the age of 40 who were given excessive case loads and excessive work loads for the purpose of forcing them to quit. Many of these older Travelers' employees were unable to

handle the execessive work loads and were forced out.

Smith changed Reidy's yearly appraisals after they were approved and signed by all the parties. As a result, without Reidy's knowledge, the yearly appraisals were lowered by Smith, and Reidy received a lower salaray than he was enttitled to over the years. This caused Reidy to lose thousands of dollars over the years.

Although Reidy requested copies of his yearly appraisals when they were made by Smith, Smith did not provide them, except for a few, and this allowed Smith to submit false lowered appraisals to Travelers. Reidy did not know that Smith was altering these yearly appraisals until the lawsuit.

As a result of the excessive work load and the constant harassment, Reidy took a medical leave of absence on or about September 6, 1988.

In May 1989, on two occasions, Reidy spoke with Joan Lawson ("Lawson"), a benefits coordinator for Travelers in Hartford, Connecticut She outlined to him the guidelines on how he was to proceed with alternative employment. Reidy provided her with his work history and medical background. Reidy was advised by her that "substantial" means that he could not earn in a year more than the money he received from Travelers in disability payments. Lawson also indicated to Reidy that if he earned a little bit more than that, that still would not be a problem.

On or about August 1, 1989, Reidy began work for A&S Delivery as a courier at $7.25 per hour. Reidy fully informed the Travelers representatives that he had started work at A&S Delivery, and also indicated that he was receiving income from that work.

On or about September 15, 1989, Reidy began treatment with a Doctor Roy Parenty ("Parenty"), a psychiatrist employed by Travelers. Dr. Parenty placed Reidy on certain medication on his very first visit, including Prozac and Pamelor. Initially, Reidy felt better from the medication, but the medication had severe side effects, including falling

asleep at the wheel, causing two accidents, and numerous near misses and near accidents. Prior to his taking the medication prescribed by Dr. Parenty, Reidy had not had an automobile accident in approximately 25 years. As a result of the Prozac, Reidy also began to have suicidal thoughts and tendencies with erratic and violent behavior. The Pamelor made Reidy very irritable and tense.

Although Reidy had been treating with Dr. Parenty for almost a year, and although he was provided with Dr. Parenty's services by Travelers, Travelers denied that they were any way involved with having Dr. Parenty treat Reidy. Reidy did not pay any of the bills associated with the treatment by Dr. Parenty, but in fact, Travelers paid for all of the medical bills regarding the treatment by Dr. Parenty. Dr. Parenty also advised Reidy that if Reidy stopped treatment with him, that the disability payment checks that he was receiving from Travelers would be discontinued.

As a result of the stress at work, Reidy developed a handicap, mainly the inability to work in a stressful environment. Reidy required a reasonable accommodation in order to return to work. Reidy was prepared to return to work at Travelers, if Travelers provided a reasonable accommodation. Travelers refused to provide Reidy a reasonable accommodation. Although Reidy never received any formal notification, he contends that he was terminated, effective June 1, 1991.

Reidy contends that there are implied or expressed policies, procedures, or practices, that employees of Travelers will be treated fairly, and that they will not be terminated, except for good reasons. Reidy contends that he was terminated in violation of those implied or expressed terms. Reidy was able to perform the terms and conditions of his employment provided that he was given a reasonable accommodation for his handicaps, but Travelers breached the terms of that employment contract by discharging Reidy and preventing him from performing the terms and conditions of his

employment contract with Travelers. At the time he went out on the medical leave of absence, his salary was $33,200.00 per year plus other employment benefits.

At the time of his discharge on or about June 1, 1991, Reidy was receiving $319.23 per week in disability benefits. These benefits ceased on June 1, 1991.

Reidy is more than forty years of age. His date of birth is July 20, 1941.

When Reidy was demoted, he was replaced by Kenneth Quick, a younger person under forty, and that when Reidy went out on disability, he was replaced by Charles Puzak, a younger person under forty, and that Travelers discriminated against Reidy in the terms and conditions of his employment because of Reidy's age.

Reidy further contends that as a result of the wrongful conduct committed against him by Travelers, that his wife, Toni E. Reidy ("Toni"), and his children, Terrance M. Reidy ("Terrance"), John A. Reidy ("John"), Brian J. Reidy ("Brian"), and George M. Reidy ("George"), suffered a loss of consortium and a loss of nurture respectively.

Travelers asserts that Reidy was incapable of performing the essential functions of his job even with a reasonable accommodation, and that Reidy was not qualified to fill any position within Travelers. Reidy categorically denies that he was incapable of performing in any capacity and further states that he was capable of performing in a light duty capacity.

Furthermore, under their own written policies, Travelers was required to offer Reidy part time work as therapy as needed, and Travelers own doctor, Dr. Felsenfeld, was working with Reidy's personal physician to find a suitable position for Reidy, and so stated this in a written memorandum dated November 19, 1990. "Reidy should return to light duty . . . that a return to work was needed even if a suitable position had to be created for Mr. Reidy . . . we have to be flexible . . . ". Dr. Felsenfeld, Travelers' doctor, also stated that the job for Mr. Reidy "had to be approved by Dr. Moretti" (Reidy's

personal physician).

Travelers failed and refused to provide Reidy this reasonable accommodation, but instead, offered Reidy a job it knew he could not do, a full-time position in the subrogation unit with a 75% workload, the position, which caused his mental impairment. Furthermore, when Reidy went out on disability in September 1988, he was working in the auto damage unit, not the subrogation unit. Travelers refused to provide Reidy any reasonable accommodation, refused to respond to his numerous oral and written requests, and ecen refused to discuss this with Reidy or his doctor, or even to follow Reidy's suggestion about getting an independent medical examination to determine Reidy's functional ability.

Travelers asserts that Reidy's employment was terminated because he was working elsewhere as a courier, and that they would provide a position for him, and that if he did not accept the position offered, that Travelers would terminate his position, which they did.

Reidy was doing everything he could to get back into the work force in order to eventually return to work at Travelers. Reidy followed the guidelines set by Travelers. It was Travelers agents who violated Travelers policies and guidelines, not Reidy, and improperly terminated Reidy's disability benefits. Reidy was told that he would receive yearly inquiries from Travelers regarding his earnings and cost of living factors after five years. Going to work as a courier was part of his therapy in order to get him back working and eventually to return him to work at Travelers. If Travelers had provided a reasonable accommodation, followed their own written policies, and followed their own doctor's advise, Reidy would have been able to return to work at Travelers.

On August 3, 1990, Reidy spoke with Jean Erickson (Erickson"), Worcester Personnel Director for Travelers, and Erickson was advised directly on the telephone regarding the particulars of Reidy's work at A&S Delivery. Erickson was to do research on Social Security benefits for Reidy, and

Erickson told Reidy that she would write to him about Social Security and the mechanics for applying for total disability benefits, which would do away with Reidy's yearly medical examinations.

On November 5, 1990, Dr. Felsenfeld sent a letter to Reidy advising him that he was expected to return to work on November 19, 1990, to perform light duty work per the letter of Dr. Moretti. On November 12, 1990, Reidy had a discussion with Dr. Moretti, and Reidy was advised that he could do less stressful work similar to the delivery or courier work he was performing for A&S Delivery. Dr. Felsenfeld, Travelers doctor, was to recommend a less stressful job in order to get Reidy back to work at Travelers. It was anticipated that Reidy would eventually be able to return fulltime to his old job. It was Dr. Moretti's opinion that Reidy could return to work in a less stressful position. Dr. Moretti also stated that he definitely did not want Reidy to return to his former very stressful work in the beginning, and Dr. Moretti so informed Dr. Felsenfeld, Travelers' in-house doctor.

In a memorandum from Travelers' Medical and Law Department dated November 19, 1990, and November 20, 1990, Doctor Felsenfeld stated, "a return to work was needed even if a suitable position had to be created for Mr. Reidy . . . some simple type of work that needed to be done such as distributing claim files. This would have been a reasonable accommodation, but Travelers never offered any reasonable accommodation for Reidy, other than going back to the job he got sick on."

Reidy informed Travelers, through Dr. Parenty, Erickson, Dr. Felsenfeld, and others that he was working as a courier. It is clear by their own documents that Travelers was aware of this fact as early as November 19, 1990. Travelers also knew prior to this because of Reidy's many conversatins with Travelers' Dr. Parenty.

On February 14, 1991, Reidy received a letter from Erickson stating recently that they learned that Reidy was

working, and therefore effective March 4, 1991, that Reidy's disability benefits would be discontinued, he would have four weeks of unpaid leave. The letter sent by Erickson was untrue, since Travelers knew that Reidy had been working, and knew this some 18 months earlier. Reidy was working as a courier as part of his therapy in order to get well enough to return to his regular job at Travelers or some other comparable job.

On March 7, 1991, Reidy had a three way telephone conversation with Erickson, and Charles R. Shaw ("Shaw"), at the home office Corporate Benefits regarding his disability benefits. They continued to say that they just found out Reidy was working. Mr. Shaw chided Reidy on several occasions, telling him that Reidy did not want to return to work. Reidy stated that he did want to return to work, but medically, he could not return to work in the same stressful environment. Reidy told Mr. Shaw that he could return to work. Mr. Shaw then said he would have Erickson send a letter outlining Reidy's return to work, and that if Reidy did not return to work, he would be terminated.

Although Travelers now makes the claim that Reidy was not entitled to be working while receiving disability benefits, this was false. When Travelers made any overpayment of anything, no matter how small or trivial, Travelers would always request and receive the money back. Travelers never asked to receive any reimbursement for any of the disability benefits paid to Reidy. Reidy received disability benefits from September 1988 through March 25, 1991.

Although Reidy requested from Travelers that he be reemployed in a less stressful position, Travelers refused to provide any accommodation to Reidy, refused to follow their own written policies, refused to follow their doctor's advice, and refused to allow Reidy to return in any capacity, other than as a claim representative in the subrogation unit, the position which caused him to become disabled in the first place. Reidy was in the auto damage unit, not the subroga-

tion unit, when he went out on disability in September 1988.

Although Travelers claims that Reidy was terminated on June 1, 1991, Travelers in fact, never gave Reidy any notice under COBRA, nor did Travelers ever provide any COBRA benefits to Reidy.

Erickson denied knowing that Reidy was working when in fact she knew that Reidy was working. Reidy received workers' compensation benefits as a result of the job stress.

According to the Decision of the Department of Industrial Accidents, Reidy sustained a personal injury arising out of and in the course of his employment and that the work stress at Travelers was extreme and was the cause of Reidy's disability.

After ten years with Travelers, an employee becomes tenured and vested, and you cannot be terminated without good cause as outlined in Travelers written policies. No one was terminated at Travelers after ten years unless there was a good cause. Furthermore, when someone was terminated, they would receive severance pay as outlined in their written policies. Reidy was never offered or did he receive severance pay.

Reidy did not refuse to return to work; Travelers refused to provide a job Reidy could reasonably perform given his mental impairment. Reidy was capable of performing work from August 1989 to September 1991, but Travelers refused to allow him to return to a suitable position. There were jobs available at Travelers that Reidy could have done, but Travelers never offered Reidy any of those jobs. The reason Reidy could not work after September 1991, was that his condition had deteriorated because he was terminated without any good reason, and Travelers refused to provide a job for him that he could have performed. The termination was devastating to Reidy, and it was Travelers that caused Reidy to become totally disabled to the present time. Reidy became totally disabled because of what Travelers did to him and what they failed to do, namely, not providing him with a job

that he could have performed.

The actions of Travelers caused Reidy to become disabled. If Travelers had given Reidy the support he needed, followed their own written policies, followed the advice of Travelers' own doctor, Reidy still would be working at Travelers. Reidy was coming along well and working well at the courier job, until Travelers fired him.

The Opinion from the Court of Appeals

Since this case was in the federal court on the basis of diversity jurisdiction, the court had to apply Massachusetts law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Rule 56(c) of the Massachusetts Rules of Civil Procedure, 365 Mass. 824 (1974) provides that a Motion for Summary Judgment shall only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law." A party moving for Summary Judgment has two burdens, (1) the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings, and (2) that he is entitled to Judgment as a matter of law. If the moving party fails to meet either burden, summary judgment must be denied. *Smith v. Massimiano*, 414 Mass. 81, 85-86 (1993). See *Foley v. Matulewicz*, 17 Mass. App. Ct. 1004 (1984); *Attorney General v. Bailey*, 386 Mass. 367 (1982). Furthermore, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the Motion for Summary Judgment. See *Hub Associates v. Goode*, 357 Mass. 449, 451 (1970). The Court may not weigh the evidence or assess credibility, or find facts. *Kelley v. Rossi*, 395 Mass. 659, 663 (1985).

Contrary to Massachusetts law, the Court of Appeals found facts and drew inferences in favor of the moving party and

incorrectly interpreted Massachusetts law.

The Court of Appeals held that Reidy "adduced no competent evidence" that he could not be terminated from his employment at Travelers without good cause.

Reidy, as a supervisor at Travelers for many years, was told and instructed by his superiors that an employee could not be terminated except for good cause.

Under Massachusetts law, one does not have to look just at a written personnel manual to determine what rights an employee may have. The employment relationship may involve written arrangements, oral arrangements, or arrangements that are implied by the actions or conduct of the parties. See *O'Brien v. New England Telephone and Telegraph Co.*, 422 Mass. 686, 691 (1996).

Reidy stated that, "After ten years with Travelers you become tenured, and you cannot be terminated without good cause. I know this because I was a supervisor. No one was terminated at Traveler's after ten years unless there was a good cause. Furthermore, when someone was terminated they could receive severance pay."

The Court of Appeals found as a fact that "there is no evidence to confirm" that the Massachusetts Commission Against Discrimination ("MCAD" the state fair employment practice agency) received a formal complaint. Again, the Court of Appeals found the facts and reasonable inferences in favor of the moving party and has misconstrued Massachusetts law.

The decision states that, "Reidy contends that his counsel mailed a formal complaint to the MCAD on August 30, 1991, but there is no evidence to confirm its receipt by the MCAD." Again, since this is a motion for summary judgment, all facts and reasonable inferences must be found in favor of the non-moving party. By letter dated August 30, 1991, Reidy, through counsel, mailed a copy of a notarized charge of discrimination outlining all of the discriminatory allegations. The MCAD sent back a form letter on September 20, 1991,

acknowledging receipt of the charge. That first form letter from the MCAD was received on September 24, 1991. Since Reidy had filed no letter outlining allegations of discrimination, and since the only statement outlining the statement of discrimination was stated on the notarized charge of discrimination, the only reasonable inference to be drawn is that the MCAD received the charge of discrimination on or about August 30, 1991.

A person who sends a charge of discrimination with the MCAD has the right to immediately withdraw the charge in order to file a private lawsuit in accordance with General Laws Chapter 151B, § 9. That is precisely what Reidy did through his counsel by letter dated September 26, 1991. Since that September 26, 1991, letter was sent by first-class mail and was not returned, the inference that must be drawn is that the MCAD received the letter. Following that September 26, 1991, letter requesting a withdrawal so that a private lawsuit could be brought, an exact duplicate of the letter dated September 20, 1991, from the MCAD was received on October 10, 1991.

The fact is that Reidy never wrote a letter to the MCAD, let alone a letter "describing Travelers' alleged discriminatory conduct." The only document ever sent to the MCAD "describing Travelers' discriminatory conduct" was the formal charge signed by Reidy and notarized and mailed by first class mail by Reidy's counsel.

Since the MCAD had never received "a letter from Reidy" the only reasonable inference that can be drawn is that a formal MCAD charge was received by the MCAD and either lost by them or not accepted by them. Since Reidy had already decided to pursue his claims of discrimination under General Laws c. 151B, § 9, the form correspondence received from the MCAD was of little or no concern, since the intent was to file the timely charge with the MCAD as required by statute and then to immediately file a lawsuit in court.

The provisions of General Laws Chapter 151B "shall be

construed liberally." General Laws Chapter 151B, § 9. "There are two largely independent avenues for redress of violation of the anti-discrimination laws of the Commonwealth, one through MCAD (G. L. c. 151B, §§ 5-6) and the other in the courts G.L. c. 151B, § 9) . . . The statutory scheme rejects the administrative law principles of primary jurisdiction and exhaustion of administrative remedies. The filing of a § 9 court action requires the MCAD to dismiss without prejudice any complaint pending before it and bars the plaintiff from pursuing the matter subsequently before the MCAD. G.L.c 151B, § 9." *Christo v. Edward G. Boyle Insurance Agency Inc.*, 402 Mass. 815, 817 (1988).

Reidy should not suffer because agents of the MCAD either lost or misplaced or the formal charge of discrimination filed with the MCAD or refused to accept it on or about August 30, 1991. Under Massachusetts law "proper mailing of a letter is 'prima facie evidence' of its receipt, which means that from proof of mailing alone the jury may but are not required to find receipt." *Commonwealth v. Crosscup*, 369 Mass. 228, 242 (1975). In fact, the district court held that "this Court is required to draw all reasonable inferences in favor of the plaintiff and therefore assumes that he did indeed file his charge with the MCAD on August 30, 1991." Contrary to the district court holding the Court of Appeals found as a fact that there was no receipt of a formal charge by the MCAD.

The facts in this case are clearly distinguishable from *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021 (1996). In *Arkwright* no timely charge was filed. In Reidy's case a timely charge was mailed to the MCAD but was either lost, misplaced, or not accepted by the MCAD. Arkwright supports Reidy's position, because in Reidy's case, the MCAD was at fault for losing, misplacing, or refusing "to accept a properly presented timely complaint." Id. at 1022. The undisputed and uncontroverted evidence is that Reidy did present a timely complaint to the MCAD. That is

Reidy's only obligation under Massachusetts law. The fact that there is no evidence "to confirm its receipt by the MCAD" is irrelevant under Massachusetts law. If the MCAD refused "to accept a properly presented timely complaint," that would not bar a claim under General Laws c. 151B, § 9. *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021, 1022 (1996).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT "THE DISTRICT COURT LACKED JURISDICTION OVER STATE EMPLOYMENT-BASED DISCRIMINATION CLAIMS" IN THEIR FINDING OF FACT THAT NO FORMAL COMPLAINT WAS RECEIVED BY THE STATE FAIR EMPLOYMENT AGENCY.

For purposes of summary judgment, all facts and reasonable inferences must be decided in favor of the non-moving party.

Reidy's counsel mailed a formal notarized charge of discrimination dated August 30, 1991, with the MCAD

The MCAD's form letter dated September 20, 1991, confirms that Reidy's formal charge was sent and received by the MCAD within six months of the discriminatory act. That first form letter from the MCAD was received on September 24, 1991. Since Reidy had filed no letter outlining allegations of discrimination, and since the only statement outlining the statement of discrimination was stated on the notarized charge of discrimination, the only reasonable inference to be drawn is that the MCAD received the charge of discrimination mailed on or about August 30, 1991.

A person who files a charge of discrimination with the MCAD has the right to immediately withdraw the charge in order to file a private lawsuit in accordance with General

Laws Chapter 151B, § 9. That is precisely what Reidy did through his counsel by letter dated September 26, 1991. Since that September 26, 1991, letter was sent by first-class mail and was not returned, the inference that must be drawn is that the MCAD received the letter. Following that September 26, 1991, letter requesting a withdrawal so that a private lawsuit could be brought, an exact duplicate of the letter dated September 20, 1991, from the MCAD was received on October 10, 1991.

The fact is that Reidy never wrote a letter to the MCAD, let alone a letter "describing Travelers' alleged discriminatory conduct." The only document ever sent to the MCAD "describing Travelers' discriminatory conduct" was the formal charge signed by Reidy and notarized and mailed by first class mail by Reidy's counsel.

Since Reidy had already decided to pursue his claims of discrimination under General Laws c. 151B, § 9, the form correspondence received from the MCAD was of little or no concern, since the intent was to file the timely charge with the MCAD as required statute and then to immediately file a lawsuit in court.

Reidy should not suffer because agents of the MCAD either lost or misplaced the formal charge of discrimination filed with the MCAD on or about August 30, 1991. This is especially so because the defendant in this case received notice of a complaint within six months of Reidy's discharge from Travelers. Travelers did not receive a stale claim, nor was Travelers prejudiced in any way in preparing their defense.

The facts in this case are clearly distinguishable from *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1012 (1996). In *Arkwright* no timely charge was sent to the MCAD. In Reidy's case a timely charge was sent but presumably lost or not accepted by the MCAD. Arkwright supports Reidy's position, because in Reidy's case, the MCAD was at fault for losing or refusing "to accept a properly presented timely complaint." Id. at 1022.

II. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO REIDY'S STATE CLAIMS FOR BREACH OF CONTRACT

Since this case is to be decided under Massachusetts law, and not Federal law, the appropriate case is not *Pearson v. John Hancock Life Ins. Co.*, 979 F.2d 254, 256-57 (First Cir. 1992), but rather Massachusetts law. In Massachusetts, one does not have to look just at a written personnel manual to determine what rights an employee may have. The employment relationship may involve written arrangements, oral arrangements, or arrangements that are implied by the actions or conduct of the parties. See *O'Brien v. New England Telephone and Telegraph Co.*, 422 Mass. 686, 691 (1996).

The District Court Judge made findings of material facts that are disputed facts:

Reidy contends that the relationship with Smith deteriorated, not because of any alleged "poor performance by Reidy" as contained in the District Court's decision, but in fact because of Smith's harassment. Reidy always received above average appraisals, even when he was being harassed.

Honore knew that Reidy's unit was severely understaffed and that Reidy was being severely overworked. Reidy was not told about any of his alleged problems until after Reidy requested the information and only after Reidy had already been transferred to the auto damage unit.

When Travelers violated their own written policies, failed to follow their doctor's advice, and failed to provide Reidy a reasonable accommodation, Reidy asked for an additional extension until September 1, 1991, to make his decision to return. Travelers never even responded to that request.

The finding "of an implied employment contract" was not just based on "his tenure with Travelers," it was based on the totality of circumstances, including policies and procedures in the workplace.

Reidy disputes that "he allowed the statute of limitations

to run on several files." This is not supported by the record.

In Massachusetts, an employment agreement may be express or implied. See *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659, 670 (1981); *Carnig v. Carr*, 167 Mass. 544, 547 (1897); *Daniell v. Boston Maine R.R.*,187 Mass. 337 (1903); *Kirkley v. F.H. Roberts Co.*, 268 Mass. 246 (1929): *Carnig v. Carr*, 167 Mass. 544, 547 (1897).

In determining the existence of a contract, the jury must consider "all attendant conditions surrounding the agreement as well as upon its terms, when the latter are not specific and clear." *Kravitz v. Merchants Distributors, Inc.*, 387 Mass. 457, 460 (1982); *Mahoney v. Hildreth Rogers Co.*, 332 Mass. 496, 498 (1955); *Carnig v. Carr, supra; Fenton v. Federal Street Bldg. Trust*, 310 Mass 610 (1942). When considering the totality of the parties' relationship, an employee's longevity of service may create an implied contract that insulates the employee from arbitrary discharge. The existence of a contract is a question for the fact-finder. *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1 (1908).

Employee manuals, handbooks, and company policies and regulations may constitute implied or express terms of a contract. See *Hobson v. McLean Hosp. Corp.*, 402 Mass. 413 (1988); *Garrity v. Valley View Nursing Home, Ind.*, 10 Mass. App. Ct. 822 (1980); *Goldhor v. Hampshire College*, 25 Mass. App. Ct. 716 (1988); *Pavadore v. School Committee of Canton*, 19 Mass. App. Ct. 943 (1985) (See cases from other jurisdictions: *Toussaint v. Blue Cross Blue Shield*, 292 NW2d 880 (1980); *Diggs v. Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914 (6th Cir. 1984); *Pine River State Bank v. Mettille*, 333 NW2d 622 (1983); *Woolley v. Hoffmann-LaRoche, Inc.*, 491 A2d 1257 (1985); *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 378 NW2d 558 (1985); *Wilkerson v. Wells Fargo Bank*, 212 CalApp3d 1217, 4 IER Cases (BNA) 831 (Col. 1989). Provisions of an employee manual or company policies may become part of the contract either by express oral agreement or by reason of an employ-

ee's legitimate expectation.

Furthermore, an employee's continuation to work may provide both assent to and consideration for the employer's promises embodied in the manual and company policies and practices. See *Smith v. Graham Refrigeration Products Co.*, Inc., 333 Mass. 181, 186 (1955).

Here, Reidy worked for Travelers for more than 20 years as a good, loyal, dedicated, and faithful employee. Reidy was aware that Travelers had personnel policies that he would be treated fairly. There was an established policy at Travelers, known to Reidy and relied upon by him, that an employee such as himself, who had performed services as a good and faithful employee, would be guaranteed fair treatment and would not be discharged unfairly or in bad faith. Because of his more than twenty years dealing with Travelers' policies, he reasonably expected that he would not be treated in an arbitrary manner. He was specifically instructed that the employees he supervised could not be discharged, except for good cause. See *O'Brien v. New England Telephone Telegraph Co.*, 422 Mass. 686, 691-694 (1996).

Reidy has set forth sufficient facts, if believed, that he had an employment contract that was breached by Travelers. Summary judgment should not have been granted on the breach of contract claim.

III. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO REIDY'S STATE CLAIMS FOR AGE AND HANDICAP DISCRIMINATION

Reidy has brought state claims for age and handicap discrimination under General Laws c. 151B and under General Laws c. 93, §103.

The standard for granting summary judgment under state law in discrimination cases differs from the federal standard. *Blare v. Husky Molding Systems, Inc.*, 419 Mass. 437 (1995). Compare to *Woods v. Friction Materials, Inc.*, 30 F3d 255 (1994).

When considering a state claim, a federal court must apply the law of the state in which it sits. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). In interpreting General Laws c. 151B, interpretations of analogous federal statutes by federal courts are not binding on Massachusetts courts interpreting its own statute. *College-Town Division of Interco., Inc. v. MCAD*, 400 Mass. 156, 163-164 (1987). The Supreme Judicial Court follows the three-part analysis in *McDonnell Douglas - Burdine*, but not as formulated by the First Circuit. See *Wheelock College v. MCAD*, 371 Mass. 130, 136-139 (1976); *Lewis v. Area II Homecare for Senior Citizens, Inc.*, 397 Mass. 761, 765-767 (1986). If Reidy's age and/or handicap made a difference, that is sufficient under Massachusetts law.

Therefore, in considering Reidy's General Laws c. 151B discrimination claim, this court must apply the law as expressed by the Supreme Judicial Court.

In alleging discrimination in violation of General Laws. c. 151B, the initial burden of establishing a prima facie case of discrimination rests with the plaintiff. *Wheelock College v. MCAD*, *supra* at 135 n. 5. Once a prima facie case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. *Id.* at 136. "Articulating" a legitimate, nondiscriminatory reason under state law "requires the employer to produce not only evidence of the reason for its action but also underlying facts in support of that reason." *Id.* (emphasis supplied), *Smith College v. MCAD*, 376 Mass. 221, 229 (1978); *Lewis v. Area II Homecare for Senior Citizens, Inc.*, *supra* at 765; *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559, 566 (1981). An employer must not only give a lawful reason for its employment decision but must also produce credible evidence to show that the reason proffered was the real reason. *Wheelock College v. MCAD, supra* at 138 (emphasis supplied).

If the employer satisfies this burden, the plaintiff has an

opportunity to show that the employer's proffered nondiscriminatory reason was a pretext. The plaintiff may satisfy this burden by showing that the proffered reason "has no reasonable support in the evidence or is wholly disbelieved (and hence is transparently pretextual)." *Wheelock College v. MCAD, supra* at 138. A plaintiff may show that the defendant's reason is pretextual by showing that it is fabricated. *Trustees of Forbes Library v. Labor Relations Commission, supra* at 566-67 n. 5. Accordingly, Reidy may prevail by means of indirect proof that Travelers' reasons for the adverse action are pretextual without presenting evidence specifically relating to his protected categories (age, handicap).

Blare, supra, makes it clear that Massachusetts has departed from the First Circuit's pretext plus standard. As the Supreme Judicial Court declared in *Flesner*, "[m]uch depends on the credibility of witnesses testifying as to their own states of mind. In these circumstances, the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue." *Flesner* at 809.

"...(O)nce a plaintiff has established a prima facie case and further shows either that the employer's articulated reasons are a pretext or by direct evidence that the actual motivation was discrimination, the plaintiff is entitled to recovery for illegal discrimination under G.L. c. 151B . . . The ultimate issue of discrimination, raised by the plaintiff's and defendant's conflicting evidence as to the defendant's motive is not for a court to decide on the basis of affidavits, but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of the witnesses." *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass. 437, 444-445 (1995).

If the plaintiff produces evidence of a prima facie case of employment discrimination, summary judgment should be denied. If the employer produces an explanation with evi-

dence of the reason for the decision, a plaintiff need only produce evidence that disputes the employer's explanation to survive summary judgment. The pretext only standard is an appropriate one given the realities of the workplace.

Applying these principles here, a jury could find the following facts and draw the following inferences:

Reidy was a handicapped person within the meaning of state law. He was also more than 40 years of age. He performed competent work over the years for Travelers in a variety of positions. He was overworked to the point he had a "nervous breakdown." He was put out on disability leave. While out on disability, he started to recover sufficiently to take a position as a courier for another company.

Reidy was given permission to work as a courier for another company while he was receiving disability payments from Travelers. This courier work was part of Reidy's therapy.

Traveler's used that as an excuse to terminate Reidy's employment. Travelers offer to bring Reidy back to work in the position that caused him to become mentally disabled or be terminated was a disingenuous offer. Travelers knew Reidy could not come back to that position.

Travelers had other available positions Reidy could have performed but did not offer him one of those positions because they did not want him to come back to work, but merely wanted to find an excuse to terminate his employment.

When Reidy could not come back to work in the only position offered to him, Travelers terminated his employment and terminated his disability payments. Those actions caused Reidy to become even more depressed and led to a total mental breakdown, thereby making him totally disabled from any work.

Travelers, having caused Reidy to become totally disabled, now argues that Reidy is not a qualified handicapped person. An employer who causes a handicapped person to become totally disabled by failing and refusing to provide a reason-

able accommodation should not be allowed to escape liability.

Reidy mailed a timely charge of discrimination to the Massachusetts Commission Against Discrimination ("MCAD") and should not be penalized for errors caused by that agency. When the request was made to withdraw the complaint from the MCAD, the fact that was not done should not cause Reidy to lose his right to bring his claim under General Laws c. 151B § 9. Travelers suffered no prejudice. Travelers will have the opportunity to defend the claim on the merits. By depriving Reidy of his day in court because of an error made by the MCAD is to put form before substance.

In enacting the handicap provisions of General Laws c. 151B, the state legislature believed that handicapped persons have been subjected to unequal treatment based on characteristics that are beyond their control and resulting from stereotypical assumptions that do not truly indicate ability to participate in and contribute to society. *Villecco v. General Electric Company*, 8 MDLR 1010, 1019-20 (1986).

The determination as to whether or not Reidy is a handicapped person is a question of fact. Travelers was required to determine whether or not Reidy could perform any job for them with a reasonable accommodation.

The employer must make an effort to determine the appropriate accommodation. The focus of this effort is on what accommodations will be effective enough to overcome the barriers to the individual's equal employment opportunities. *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985). It is the employer's, not the employee's, duty to suggest methods of reasonable accommodation. *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281, 6 AD (BNA) Cases 67 (7th Cir. 1996); *Crane v. Lewis*, 551 F. Supp. 27, 32 (D.D.C. 1982); *Butler v. Department of the Navy*, 595 F. Supp. 1063, 1067-68 (D. Md. 1984).

The burden of persuasion is on the employer to prove that an accommodation is not possible or would impose an undue hardship on the operation of its business. *Prewitt v. United*

States Postal Service, 662 F.2d 292, 308 (5th Cir. 1981).

Transferring a handicapped employee from one job to another for which he is qualified as a reasonable accommodation is permissible. General Laws c. 151B, § 4(16), recognizes that transfer to a comparable job is a reasonable accommodation. Although an employer is not required to create a new position or to bump another employee from his job to give it to the handicapped employee, an employer cannot deprive a qualified handicapped employee, as a reasonable accommodation, alternative employment opportunities available under the employer's existing policies. Accordingly, if an employee is unable to perform the essential functions of a job because of his impairment, he may transfer to a different vacant position for which he is qualified as a reasonable accommodation. Travelers' own policy, that they did not follow in Reidy's case, should have allowed Reidy to return to work gradually on a part-time basis.

Furthermore, the district court erred in holding that to prevail in a handicap discrimination, the employee had to establish that the action was taken solely because of his handicap. This is not the law. It is enough if the employee's handicap made a difference. *McNely v. Ocala Star-Banner Corp.*, 6 AD (BNA) Cases 78 (11th Cir. 1996).

Reidy has met his burden of establishing a prima facie case and summary judgment should not have been granted.

IV. REIDY HAS SET FORTH SUFFICIENT FACTS TO ESTABLISH CLAIMS FOR LOSS OF CONSORTIUM AND LOSS OF NURTURE

Massachusetts recognizes causes of action for loss of consortium in favor of spouses, *Diaz v. Eli Lilly and Co.*, 364 Mass. 153 (1973), as well as for loss of nurture in favor of minors. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507 (1980). A claim for loss of consortium is the loss of the rights and duties of married life, including love, affection,

companionship, society, comfort and services. *Diaz v. Eli Lilly and Co., supra.* The loss of nurture concerns the parent and child relationship and the loss of emotional guidance, support, and nurture. *Ferriter v. Daniel O'Connell's Sons, Inc., supra.* These claims are considered derivative claims in the sense that they do not arise unless the impaired spouse or parent has sustained some legally cognizable injury; otherwise they are separate causes of action.

Nothing in General Laws c. 151B precludes causes of action for loss of consortium or nurture. These causes of action are existing legal remedies. Nothing in the provisions of General Laws c. 151B suggests that these causes of action have been eliminated. As the Supreme Judicial Court explained in *Comey v. Hill*, 387 Mass. 11, 20 (1982), repeal of the common law by implication of a statute is not to be inferred; rather legislative intent must be evident.

Legislative intent was evident with respect to industrial accidents remedied pursuant to the worker's compensation statute. General Laws c. 152, § 24. The worker's compensation statute seeks to remedy injuries suffered on the job. Section 24, therefore, precludes consortium claims stemming from an on-the-job injury to the impaired spouse that is cognizable under that statute. On the other hand, General Laws c. 151B seeks to remedy a different type of injury. It seeks to remedy unfair treatment. Accordingly, General Laws c. 152, §24 does not preclude these derivative claims. Cf., *Reese v. Sears, Roebuck Co.,* 107 Wash 2d 563, 731 P.2d 4973, 51 FEP (BNA) Cases 784, 788-89 (Wash. 1987).

To read the state fair employment law as limiting the legal remedies for loss of consortium and nurture would deny the breadth and comprehensive nature of this remedial statute. *Eide v. Kelsey-Hayes Co.*, 431 Mich. 26, 247 NW2d 488, 47 FEP (BNA) Cases 1050 (Mich. 1988) (loss of consortium claim not precluded by state's civil rights act); *Milnikel v. Mercy-Memorial Med. Center*, 183 Mich. App. 221, 454 NW2d 132, 53 FEP (BNA) Cases 908 (Mich. App. Ct. 1989)

(loss of consortium claim not barred by state's handicap civil rights act). Reidy's wife and children may therefore assert claims for loss of consortium and nurture, respectively.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,
Frederick T. Golder
BBO NO: 198580
BERNSTEIN, GOLDER & MILLER, P.A.
230 Broadway, Suite 104
Lynnfield, MA 01940
(617) 592-4000

Counsel for Petitioners

APPENDIX TABLE OF CONTENTS

Appendix A

Opinion of the Appeals Court for the First Circuit 1A

Appendix B

Opinion of the United States District Court for the District of Massachusetts 6A

Appendix C

Andrews v. Arkwright Mutual Insurance Company, 423 Mass. 1021 (1996), Opinion of the Supreme Judicial Court of Massachusetts 21A

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 96-1814

GEORGE M. REIDY, ET AL.,

Plaintiffs - Appellants

v.

THE TRAVELERS INSURANCE CO.,

Defendant - Appellee

JUDGMENT

Entered: February 13, 1997

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ WIILIAM H. NG

Clerk.

CC: Frederick T. Colder, Esq.
Jay M. Presser, Esq.

[Not For Publication]
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1814

GEORGE F. REIDY, ET AL.,

Plaintiffs, Appellants,

v.

TRAVELERS INSURANCE COMPANY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before

Cyr, Circuit Judge,

Coffin, Senior Circuit Judge,

and Lynch, Circuit Judge.

Frederick T. Golder, with whom Bernstein, Golder & Miller, P.A. was on brief for appellants.

Jay M. Presser, with whom Jeffrey C. Hummel and Skoler, Abbott & Presser, P.C. were on brief for appellee.

February 13, 1997

Per Curium. George Reidy challenges a summary judgment ruling dismissing his wrongful discharge claims against The Travelers Insurance Company ("Travelers") for whom Reidy worked for over twenty years. Although Travelers contends that Reidy proved incapable of performing his work as a claims representative despite a reasonable accommodation of his stress-related "disability," Reidy asserts that Travelers' justification was pretextual. We affirm the district court judgment.

The four-count complaint alleged (i) breach of the employment contract; (ii) employment discrimination based on age; (iii) and on handicap; and (iv) claims for loss of consortium and nurture by his spouse and children.[1] As concerns the claim for breach of contract, Reidy appears to have believed that his long tenure as an employee-at-will protected him from arbitrary termination, but he adduced no competent evidence, See Fed. R. Civ. P. 56(e), that Travelers gave him any such assurance. Instead, Reidy principally contends that the written employee manual constituted a binding employment "contract" barring arbitrary discharge even though it unambiguously provided that Travelers was "free to terminate your employment at any time, for any or for no reason, and with or without advance notice," and that "no Travelers' manager or other person at the company has the authority to make a commitment of guaranteed or continuing employment." (Emphasis added.) Nor does Reidy cite any other provision (e.g., minimum term of employment) which assured him protection from unilateral, unconditional termination. See e.g., Pearson v. John Hancock Mut. Life Ins. Co., 979 F.2d 254, 256-57 (1st Cir. 1992).

The age and handicap discrimination claims fare no better. Massachusetts courts have no jurisdiction over employment discrimination claims unless the plaintiff-employee has filed a formal complaint with the Massachusetts Commission Against

---

[1] We review the summary judgment ruling de novo, viewing all evidence in the light most favorable to Reidy. Byrd v. Ronayne, 61 F.3d 1026, 1030 (1st Cir. 1995).

Discrimination ("MCAD") within six months of the alleged discriminatory act. See Mass. Gen. Laws ch. 151B, §§ 4(1.B), 4(16), 5, 9; Clarke v. Kentucky Fried Chicken of Calif., Inc., 57 F.3d 21, 23 (1st Cir. 1995); Andrews v. Arkwright Mut. Ins. Co., 673 N.E. 2d 40, 41 (Mass. 1996). Reidy contends that his counsel mailed a formal complaint to the MCAD on August 30, 1991, but there is no evidence to confirm its receipt by the MCAD. The official MCAD record itself reflects no formal complaint. Moreover, on September 20, the MCAD compliance officer wrote Reidy and confirmed the receipt of his letter describing Travelers' alleged discriminatory conduct, but advised that a formal complaint would still be necessary to initiate MCAD action. A copy of the MCAD letter was provided to Reidy's counsel as well.

Although the MCAD letter plainly placed both Reidy and counsel on notice that the MCAD had received a letter from Reidy, rather than any August 30 letter from Reidy's counsel enclosing a formal MCAD complaint, neither Reidy nor counsel followed up on this obvious discrepancy or on the formal advice contained in the letter from the MCAD compliance officer.[2] Accordingly, the district court lacked jurisdiction and the employment-based discrimination claims were properly dismissed.

Affirmed.

---

[2] Thus, Reidy's insistence that the summary judgment ruling penalized him for MCAD's administrative incompetence lacks record support. Of course, if cognizable, such unsubstantiated "defenses" would all but eviscerate the exhaustion requirement.

Since Reidy no longer holds actionable employment discrimination claims against Travelers, the district court properly dismissed the related claims by the spouse and children as well. See Tauriac v. Polaroid Corp., 716 F. Supp. 672, 673 (D. Mass. 1989) (citing Mouradian v. General Elec. Co., 503 N.E. 2d 1318, 1321 (Mass. App. Ct.) (dismissing wife's consortium claim because husband had no viable employment discrimination claim), review denied, 507 N.E.2d 1056 (1987)); see also Mass. Gen. Laws ch. 152, § 24 (1990) (workers' compensation statute preempts consortium claims of spouse, children and parents); Hamilton v. Baystate Med. Educ. & Research Found., 866 F. Supp. 51, 57 (D. Mass. 1994), aff'd, 66 F.3d 306 (1st Cir. 1995); St. Germaine v. Pendergast, 584 N.E. 2d 611, 617-18 (Mass. 1992).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE F. REIDY, TONI E. REIDY, TERRENCE M. REIDY, JOHN A. REIDY, BRIAN J. REIDY, and GEORGE M. REIDY,

Plaintiff(s),

v.

CIVIL ACTION
NO. 91-40154-NMG

THE TRAVELERS INSURANCE CO.,

Defendant.

JUDGMENT

GORTON, D.J.

In accordance with this Court's Memorandum and Order issued on June 3, 1996, allowing the defendant's Motion for Summary Judgment, it is hereby ORDERED;

Judgment for the defendant.

BY THE COURT,

\s_____
Deborah F. Shattuck
Deputy Clerk in Charge

DATED: June 3, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE F. REIDY, TONI E. REIDY, TERRENCE M. REIDY, JOHN A. REIDY, BRIAN J. REIDY, and GEORGE M. REIDY,	)	
Plaintiffs,	)	
v.	)	Civil Action NO. 91-40154 NMG
THE TRAVELERS INSURANCE CO,,	)	
Defendant.	)	

MEMORANDUM AND ORDER

GORTON, J.

Pending before this Court is defendant's motion for summary judgment on all counts. For the reasons set forth below, the motion will be allowed.

I. BACKGROUND

This Court summarizes the evidence in the light most favorable to the plaintiffs and resolves in their favor all reasonable inferences that could be drawn from that evidence.

Plaintiff, George F. Reidy ("Reidy"), was born on July 20, 1941. In August, 1967, he began working for defendant, Travelers Insurance Co. ("Travelers"), as an outside claims representative. He was soon promoted to assistant supervisor of the Personal Injury Payments Unit and placed under the direction of James Smith.

In 1973, as a result of his strong work performance, Reidy was promoted to unit head/supervisor of the Subrogation Unit and con-

tinued to report to Smith. Beginning in the mid-1970s, the relationship between Reidy and Smith deteriorated, based in part on Smith's allegations of poor work performance by Reidy. Although Reidy does not remember specific details, he admits that Smith may have questioned him about not working enough hours, taking extended coffee breaks and excessive socializing while on company time. Plaintiffs' Local Rule 56.1 Statement at 4. In 1978, Smith threatened to place Reidy on probation but dropped his threat when Reidy indicated that he would pursue legal action.

In 1983, Travelers consolidated its Worcester and Springfield offices and Reidy began to experience a substantial increase in his workload. It was around this time that Reidy began demonstrating the first signs of illness, including sleeping difficulties, depression and memory loss.

In the fall of 1985, Smith left the company and was replaced by John Honore. Reidy and Honore started out with a good working relationship. Reidy mentioned to Honore some of the problems that he saw within the unit, such as understaffing, large caseloads and computer problems. When Honore did not take any action to correct these problems, Reidy began to feel "that Honore might be out to get him" and "that Honore was perpetuating the treatment that Smith had started." Plaintiffs' Local Rule 56.1 Statement at 10. Reidy alleges that "Honore would have let the entire unit fail in order to establish a basis for discharging Reidy." Id. Reidy also alleges that age was a factor in Honore's treatment of him because Reidy saw that several older employees "had been forced to retire due to the Company's age discrimination and excessive demands." Id. Although Reidy continued to receive good job evaluations, he felt that these evaluations were "part of [a] smoke screen" so that Reidy would not realize that Honore was planning "to lower the boom" on him. Id.; Reidy Deposition, Vol. II at 100.

At some point, Honore reviewed Reidy's files and noticed that Reidy had allowed the statute of limitations to run on some of his files. Honore also told Reidy that he thought Reidy was taking

extended lunches and coffee breaks and making too many personal phone calls while at work. Reidy admits that these conversations took place, although he does not recall exactly when they occurred. Plaintiffs' Local Rule 56.1 Statement at 11. Reidy denies, however, that he committed the underlying behavior of which he was accused. Id.

In late August, 1987, plaintiff was reassigned to defendant's Auto Damage Unit to work as a claims representative. Technically, this was a demotion. Plaintiff however retained his title and pay level from the Subrogation Unit. Reidy was told that he had been transferred for several reasons, including tardiness, missing the statute of limitations on several workers' compensation cases, long lunches and coffee breaks, taking too much time reading the daily newspaper during work hours, failure to handle subrogation cases in a timely and diligent manner, and excessive personal phone calls. Memorandum from Honore to Reidy dated August 26, 1987.

In the Auto Damage Unit, plaintiff worked for Assistant Manager Harold Miller and Supervisor Terry Stachura. At first, Reidy did not believe that Miller and Stachura "were out to get him." Plaintiffs' Local Rule 56.1 Statement at 13. Eventually, however, Reidy began to notice that Miller and Stachura would not help him or cooperate with him. Id.; Reidy Deposition, Vol. II at 116.

In February, 1988, Reidy was told by Stachura that there was a problem with his backlog of files. Plaintiff subsequently met with Honore and Miller about his slowness in learning new materials. Plaintiff now alleges that this slowness of learning was one of the early signs of his health problems, although he was not aware of it at that time.

On June 1, 1988, plaintiff was informed by Honore that failure to improve his performance within 60 days would result in a final warning. That warning came on August 17, 1988, when plaintiff was told that failure to improve his performance within 60 days would result in termination.

Reidy took a vacation in late August, 1988. On August 30,

1988, Reidy was scheduled to report for work but did not. Instead, he called the following day and told defendant that he was not well and would not be in for the rest of the week. On September 6, 1988, Reidy called and reported that he still was not well. Plaintiff requested, and received, a medical leave of absence due to stress, which he claimed was a result of his excessive workload and the constant harassment he faced from defendant's agents.

Reidy also filed for and obtained disability payments pursuant to defendant's Sick Leave Plan. Under the terms of that Plan, an employee had to be "completely unable, because of injury or sickness, to be at work and perform the material duties of [his/her] occupation" in order to receive sick leave benefits. The Plan further provided that such an employee would no longer be considered disabled "if [he were] able to come back to work at The Travelers or if [he worked] elsewhere for wage or profit." Planned Protection at 64.

Sometime in 1989, Reidy alleges that he contacted the defendant's Employee Benefits Agent, Joan Lawson, to find out whether he could obtain paid employment while receiving disability benefits from the company. Plaintiff claims that he was told that he could work elsewhere so long as he did not earn more than he was collecting under the Plan. On August 1, 1989, plaintiff began working as a courier for A & S Delivery, earning $7.25 per hour.

In September, 1989, defendant arranged for Reidy to receive an independent medical examination from Dr. Roy Parenty at defendant's expense. Plaintiff informed Dr. Parenty of his courier job and believed that Dr. Parenty was defendant's agent and would therefore inform defendant of his job.

In a letter dated November 5, 1990, defendant' s company physician, Dr. Herbert Felsenfeld, advised Reidy that his treating physician, Dr. Mario Moretti, had indicated that he would be able to return to work in a light duty capacity. Dr. Felsenfeld informed Reidy that he would be expected to return to work at Travelers on November 19, 1990.

Reidy informed defendant that he was not capable of returning to his former two positions at the company because they were too stressful. Reidy instead asked for a position as a courier or filer. At that time, Reidy was aware that the company had courier positions in Hartford and was willing to work in the Hartford office as such. Reidy also informed Jeanne Erickson of the company's Corporate Human Resources Department that Travelers would have to develop guidelines for a job that Dr. Moretti could approve.

On December 4, 1990, Dr. Felsenfeld proposed a light duty job description that was intended to eliminate as much stress as possible and enable Reidy to return to work. Under that proposal, Reidy would have returned to his former position as a claims representative in the Subrogation Unit, where he would be given a 25% reduction in workload and would not have to deal directly with customers. By letter dated December 17, 1990, Dr. Moretti informed defendant that plaintiff would not be able to assume that proposed position. Plaintiff claims that, at that time, he was still experiencing severe headaches, memory loss and depression.

On February 14, 1991, defendant informed Reidy that it had just recently learned of his courier job with A&S and that, pursuant to the terms of its Sick Leave Plan, Reidy would no longer be considered disabled for purposes of receiving sick leave benefits because he was working elsewhere for wages. Plaintiff was told that he would be placed on unpaid leave as of March 4, 1991, but that his position at Travelers would remain open for four weeks. If plaintiff did not return to work within that time, defendant would assume that plaintiff had terminated his employment.

By letter dated March 12, 1991, Travelers informed plaintiff that his sick leave benefits would be extended for two weeks until March 25, 1991. Plaintiff was also informed that his unpaid leave would now commence as of that new date and extend for four weeks. If Reidy failed to return to work at the end of that period, he would be considered terminated.

On April 13, 1991, plaintiff requested an extension of his

unpaid leave until June 1, 1991, which defendant granted. When plaintiff did not report for work by the latter date, he was terminated. After his termination, Reidy claims that he began to deteriorate emotionally and, as a result, was forced to leave his courier position sometime in August or September, 1991. Reidy has not worked since that time.

In November, 1992, Reidy began seeing Dr. Leo Polizoti for his stress related medical problems. Dr. Polizoti characterized plaintiff's condition as permanent burnout and stated that plaintiff was "not able to work" and would have "a very difficult time functioning at a 'normal' level" even in his personal life. Dr. Polizoti further stated that plaintiff's disability appeared to be permanent at that time. Medical Report of Dr. Polizoti dated March 2, 1993.

II. PROCEDURAL HISTORY

On or about August 30, 1991, plaintiff claims that he mailed a "Charge of Discrimination" to the Massachusetts Commission Against Discrimination ("MCAD"), alleging age and handicap discrimination in violation of M.G.L. c.151B and c.93, § 103. In the cover letter which accompanied that Charge, plaintiff requested that a withdrawal form be sent to him after Travelers filed its position statement so that plaintiff could file a claim in court.

By a letter dated September 20, 1991, the MCAD informed plaintiff that it could not act upon his allegations of discrimination until he filed a formal complaint. In order to facilitate that procedure, the MCAD officer informed Reidy that he would have to meet with a representative of the agency to discuss further his situation. On September 26, 1991, plaintiff sent a letter to the MCAD in which he asked for a copy of Travelers' position statement and again requested a withdrawal form so that a private lawsuit could be brought. There was no further correspondence between plaintiff and the MCAD.

On or around October 7, 1991, Reidy filed a Complaint in the Massachusetts Superior Court, Worcester Division, alleging breach of contract, age discrimination in violation of M.G.L. c. 151B, handicap discrimination in violation of M.G.L. c. 93, §

103. The Complaint also contained a claim by Reidy's wife, Toni, for loss of consortium, and four separate claims for loss of nurture by each of Reidy's four minor children, Terrence, John, Brian and George. Defendant filed a notice of removal to this Court on November 1, 1991 on the grounds of diversity jurisdiction. On July 20, 1995, defendant filed the instant motion for summary judgment.

On or around October 10, 1991, plaintiff also filed a claim for workers' compensation pursuant to M.G.L. c. 152, §§ 34, 35. That claim was initially denied and plaintiff appealed. Three hearings were subsequently held before Administrative Law Judge Dianne L. Solomon of the Department of Industrial Accidents. On May 25, 1995, Judge Solomon found that plaintiff's emotional condition rendered him "incapacitated for any gainful employment." Decision of the Administrative Law Judge of the Department of Industrial Accidents at 14. Judge Solomon also found plaintiff's "incapacity to be total" with the exception of the 19 month period when he worked for A & S. Id. at 18. Plaintiff was awarded, and continues to receive, workers' compensation benefits.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment shall be rendered where the pleadings, discovery on file and affidavits, if any, show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the entire record in the light most favorable to the plaintiffs and indulge all reasonable inferences in their favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993).

The moving party bears the burden of showing that "there is an absence of evidence to support the non-moving party's case." FDIC v. Municipality of Ponce, 904 F.2d 740, 742 (1st Cir. 1990). If the movant does so, the burden then shifts to the non-moving party to establish affirmatively the existence of a genuine material issue of fact. Id. In deciding whether a factual dispute is genuine, this Court determines whether "the evidence

is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmovant's assertion of mere allegations or its denial of the pleadings is insufficient, without more, to establish a genuine issue of material fact. Fed. R. Civ. P. 56(e).

B. Legal Analysis

1. Breach of Contract

In Count I, plaintiff Reidy alleges that Travelers breached the terms of his employment contract with the company. Although the specific grounds for this breach of contract claim are not entirely clear from the Complaint, this Court is mindful of its duty to draw all reasonable inferences from the pleadings in favor of the plaintiff. Based upon that standard of review, this Court infers that plaintiff has alleged a breach of contract claim based upon a) breach of an express or implied employment agreement and b) unlawful termination on the basis of plaintiff's age and/or handicap.[1]

a. Breach of Express/Implied Employment Agreement

With respect to plaintiff's first ground for relief, plaintiff does not produce any evidence of a written employment agreement. Instead, he argues that there were "implied or expressed policies, procedures, or practices" that employees of Travelers would be treated fairly and terminated only for just cause. Complaint at 45. Because defendant terminated plaintiff "in violation of those implied or expressed terms", plaintiff claims that defendant prevented him "from performing the terms and conditions of his employment contract with Travelers." Id. at 46, 47.

---

[1] In its memorandum in support of its motion for summary judgment, defendant addresses, and argues for the dismissal of, plaintiff's claim for breach of contract based upon the defendant's termination of plaintiff's disability benefits. Specifically, defendant argues that any such claim is preempted by the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144 (a) which states that "the provisions of this subchapter ... shall supersede any and all State laws insofar as they may now and hereafter relate to any employee benefit plan...." Plaintiff, in turn, responds that, because the discontinuance

Plaintiff relies upon 1) an employee manual and 2) his 23 year "tenure" with the company to argue that he had an implied employment agreement with the defendant. This Court is not persuaded by either argument.

First, in order to determine whether the terms of an employer's personnel manual can constitute a binding contract under Massachusetts law, this Court considers the following factors: whether the manual's terms were i) unilaterally modifiable, ii) merely hortatory, iii) negotiated in a particular instance, iv) specially emphasized by the employer, v) seasonably accepted by the employee, and vi) characterizable as specifying some period, of employment (or, alternatively, some definitive limit on the otherwise fluid nature of at-will employment). Pearson v. John Hancock Mut. Life Ins. Co., 979 F.2d 254, 256 (1st Cir. 1992); Jackson v. Action for Boston Community Development, 403 Mass. 8, 14-15 (1988).

Plaintiff has submitted no evidence relating to any of these factors. Indeed, the employee handbook specifically provided that both employee and employer were free to terminate an employee's employment "at any time, for any or for no reason, and with

---

of his disability benefits is evidence of discrimination towards him, his claim for loss of benefits is only "peripheral" to the ERISA plan and thus does not sufficiently "relate to" an employee benefit plan so as to warrant ERISA preemption.

This Court need not address the merits of these arguments because plaintiff's Complaint can not reasonably be read to include a claim for breach of contract claim based upon the termination of Reidy's sick ' leave benefits. At most, plaintiff alleges in paragraph 50 of his Complaint that "his disability benefits ceased on June 1, 1991." In the following paragraph, plaintiff states, in reference to the sum of the 50 paragraphs preceding it, that "[t]his count is for breach of employment contract." Without more, this Court will not read into the Complaint a claim seeking relief for the termination of Reidy' s sick leave benefits. Where a plaintiff has not spelled out his theories of relief clearly and distinctly in his Complaint, this Court is not obliged to infer all potential alternative grounds for relief. See Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179, 183 (1st Cir. 1989); Paterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988).

or without advance notice." The Travelers Employee Handbook at 15. This Court therefore concludes that no reasonable jury could find that an implied contract was formed based upon the employee handbook.

Second, plaintiff argues that an "implied contract preventing an unjust dismissal may also be created when the employee's length of service is considered." Plaintiffs' Memorandum in Opposition at 4. Because Reidy had worked for Travelers for over 20 years, he claims that he had a "reasonable expectation" that, due to his tenure with the company, "the Company would follow the procedures of fundamental fairness" if it ever terminated him. Id. at 5.

In support of that argument, plaintiff cites one Massachusetts case, McKinney v. National Dairy Council, 491 F.Supp. 1108 (D.Mass. 1980), which held that, where the New York Statute of Frauds prevented enforceability of an employment contract, termination of an at-will employee on the basis of his age after 19 years of service was actionable as a violation of the implied obligation of good faith and fair dealing. Id. at 1122. A "compelling" factor in that decision was the fact that, when plaintiff first began working for his employer, he had clearly and explicitly indicated that he was looking for what would be the last job in his working career. Id. Plaintiff Reidy, by contrast, has not presented any evidence that would support a finding of an implied employment contract based on his tenure with Travelers. He relies simply upon the fact that he always received "above average appraisals and steady promotions until the discriminatory behavior commenced." Plaintiffs' Memorandum in Opposition at 5. This Court concludes that no reasonable jury could conclude that an implied contract was formed based upon Reidy's years of service at the company.

b. Unlawful discrimination

Plaintiff's second ground for relief on his breach of employment contract claim is based upon his allegation that he was wrongfully terminated on the basis of his age and/or handicap. Complaint at 21-25, 40-43, 47. Massachusetts courts have

made clear that where the legislature has already provided a comprehensive remedial statute such as M.G.L. c.151B, the state's discrimination in employment statute, Massachusetts courts will not create a new common law action based upon the public policy expressed in that statute. Charland v. Muzi Motors, Inc., 417 Mass. 580, 585 (1994) (adopting the analysis and conclusion of Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 513 (1985)). To the extent that Reidy's common law claim for breach of contract is based upon Traveler's allegedly discriminatory employment practices, it is preempted by M.G.L. c.151B.

Defendant's motion for summary judgment on Count I will, therefore, be ALLOWED.

2. Violation of M.G.L. c. 151B

In Count II, Reidy alleges that Travelers and its duly authorized agents and employees intentionally "engaged in a pattern or practice of discriminating against older employees by forcing them out" through harassment and the creation of a stressful environment. Complaint at 54, 55. This claim for age discrimination in violation of M.G.L. c.151B in Count II is accompanied by a separate claim for handicap discrimination in violation of M.G.L. c. 93,§ 103 in Count III. Because M.G.L. c. 151B is the exclusive state law remedy for employment discrimination complaints, it preempts claims brought under M.G.L. c.93, § 103. See Woods v. Friction Materials Friction Materials, Inc., 30 F.3d 255, 264 (1st Cir. 1994). The defendant's motion for summary judgment on Count III will, therefore, be ALLOWED.

In his brief, plaintiff argues both of his claims for age and handicap discrimination under Chapter 151B. See Plaintiffs' Memorandum in Opposition at 15-18. Although a strict reading of his Complaint would bar any claim for handicap discrimination under Chapter 151B because it was not properly pleaded, this Court will extend plaintiff the benefit of the doubt and analyze both his age and handicap discrimination claims under that statute.

a. Failure to follow administrative procedures

Defendant argues that plaintiff's discrimination claim should be

dismissed because Reidy failed to follow proper administrative procedures with the MCAD prior to filing suit in this Court.

Under Massachusetts case law, it is clear that a plaintiff alleging employment discrimination has "two largely independent avenues for redress... one through the MCAD ... and the other in the courts." Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 817 (1988). A plaintiff "may maintain a civil action only if [he] has previously filed a timely complaint with the [MCAD] and ninety days have passed (or a commissioner has assented [in writing] to an earlier filing)." Id. at 816; M.G.L. c.151B. § 9. A plaintiff may not otherwise resort to the courts for a discrimination claim that is within the jurisdiction of the MCAD unless he has followed these procedures. See Charland, 417 Mass. at 583-584.

In this case, plaintiff has presented evidence which, if credited, would show that:

1) by letter dated August 30, 1991, his attorney asked the MCAD to file an enclosed Charge of Discrimination on plaintiff's behalf and to send a withdrawal form so that plaintiff could file a private civil lawsuit.
2) by letter dated September 20, 1991, an officer of the MCAD wrote to plaintiff directly and informed him that he would have to file a formal complaint with the agency before the MCAD could act on it. The officer also informed plaintiff that an MCAD representative would need to meet with him to discuss further his situation before an investigation could proceed.
3) by letter dated September 26, 1991, plaintiff's attorney again asked the MCAD for a withdraw al form so that plaintiff could bring a private lawsuit.

Plaintiff has presented no evidence of any other correspondence with the MCAD but contends that the above letters indicate that a timely charge of discrimination was indeed filed.

The MCAD, however, has no record of the filing of that charge. See Deposition of Alan Cassella at 18-19; letter from Nancy L. Barnes to Jay M. Presser dated May 4, 1992; see also Affidavit of Robert L. Sanders. Plaintiff responds that the MCAD must have lost his charge and argues that he should not be prejudiced by such an administrative error. Plaintiff thus asks this Court to use its equitable powers to permit the instant lawsuit to proceed.

For the purposes of this summary judgment motion, this Court is required to draw all reasonable inferences in favor of the plaintiff and therefore assumes that he did indeed file his charge with the MCAD on August 30, 1991. Nevertheless, the fact remains that plaintiff did not wait 90 days before filing the instant lawsuit in Massachusetts Superior Court on October 7, 1991. Nor has plaintiff submitted any evidence of a withdrawal letter from the MCAD which would have allowed him to seek earlier relief in the courts. Therefore, this Court concludes that, as a matter of law, plaintiff failed to follow the proper administrative procedures for filing his employment discrimination claims. On that ground alone, defendant's motion for summary judgment on Count II will be ALLOWED.

b. Plaintiff's Substantive Claims

Notwithstanding plaintiff's failure to follow those required administrative procedures and for the sake of completeness, this Court will consider plaintiff's substantive claims for age and handicap discrimination.

Plaintiff alleges that, in terminating his employment on June 1, 1991, defendant unlawfully discriminated against him on the basis of his age and handicap. In examining a claim for age and/or handicap discrimination under Chapter 151B where there is no direct evidence of such discrimination, the Court applies the three-stage burden-shifting framework followed by Massachusetts courts, as recently clarified by the Supreme Judicial Court of Massachusetts in Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437 (1995).

At the first stage of the analysis, plaintiff must establish a prima

facie case of employment discrimination. If he carries that burden, it will be presumed that defendant engaged in age and/or handicap discrimination. Blare, 419 Mass. at 441. The burden then shifts to the defendant to rebut that presumption by articulating a legitimate, non-discriminatory reason for its action. Id. If defendant successfully does so, the presumption of discrimination created by the prima facie case drops from the case and the burden shifts back to plaintiff to show that defendant's articulated justification is not true but a pretext. Id. at 443. Unlike the burden required under the federal antidiscrimination statute, a plaintiff alleging a violation of M.G.L. c.151B need not present evidence of defendant's alleged discriminatory animus to survive defendant's motion for summary judgment. Id.

i. Age Discrimination

Under M.G.L. c. 151B, § 4, "[i]t shall be an unlawful practice [f]or an employer in the private sector, by himself or his agent, because of the age of any individual,... to discharge from employment such individual..." In order to establish a prima facie case of age discrimination, plaintiff must produce evidence that 1) he is older than 40 years old, 2) he performed his job at an acceptable level, 3) he was terminated, and 4) defendant sought to fill plaintiff's position by hiring another individual with qualifications similar to his. Blare, 419 Mass. at 441.

Plaintiff was born on July 20, 1941 and was 49 years old at the time of the alleged discriminatory act of termination. Elements one and three of the prima facie case have thus been met.

With respect to the second element of the prima facie case, plaintiff alleges that he was promoted at various points during his career due to strong work performance. Plaintiffs' Local Rule 56.1 Statement at 2-3. Plaintiff further alleges that he always received above average annual appraisals. Complaint at 11. Plaintiff admits that he allowed the statute of limitations to run on several files for which he was responsible and that he was often reprimanded for long and excessive coffee breaks, lunches and personal telephone calls. Plaintiff's burden is not, however, onerous at this preliminary stage of the analysis. See Woodman v.

Haemonetics Corp., 51 F.3d 1087, 1091 (1st Cir. 1995) (discussing plaintiff's burden in the context of the federal Age Discrimination in Employment Act). This Court therefore assumes that plaintiff's job performance was acceptable.

Plaintiff has not, however, submitted any evidence to support the fourth element of the prima facie case, that is, that Travelers sought to replace Reidy with an employee with similar qualifications. Rather, plaintiff merely states that he "believes" that he was replaced by a younger person. Complaint at 56. Mere allegations that he was so replaced, without more, are insufficient to establish a prima facie case of age discrimination. Based upon that deficiency alone, plaintiff's substantive claim of age discrimination fails without this Court having to reach the second or third stage of the burden-shifting framework.

Had plaintiff succeeded in establishing a prima facie case of age discrimination, the burden would have then shifted to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment decision. In this case, Travelers produced evidence that it 1) terminated the plaintiff's disability benefits and placed him on unpaid leave because plaintiff was found to have been working as a paid courier for A&S Delivery, contrary to the terms of the company' s disability plan, and 2) terminated the plaintiff's employment only after affording him repeated opportunities to return to his former position with a reduction in workload. See Letters from Jeanne Erickson to Reidy dated February 14, 1991, March 12, 1991 and March 28, 1991. Based upon that credible evidence, this Court concludes that Travelers would have met its burden of providing lawful reasons for its employment decision.

The burden would then have shifted back to the plaintiff to show "either that the employer's reason was a pretext or that the actual reason for the adverse hiring decision was discrimination" in order to survive defendant's motion for summary judgment. Blare 419 Mass. at 445. Plaintiff presented no evidence in that regard. Aside from mere allegations in his Complaint that defendant "engaged in a pattern or practice [of] discriminating against

older workers by increasing their workload beyond their ability to perform it successfully" for the express purpose "of forcing them to quit", see Complaint at 24, 25, plaintiff neither set forth any specific facts nor presented any evidence to show that 1) the defendant's articulated reason was more likely than not a pretext for actual discrimination, or 2) the actual motivation for Travelers' actions was discrimination.

For all the reasons stated herein, the defendant's motion for summary judgment on plaintiff's age discrimination claim will, therefore, be ALLOWED.

ii. Handicap Discrimination

M.G.L. c.151B, § 4 also provides that "[it shall be an unlawful practice...

> [f]or any employer, personally or through an agent, to dismiss from employment ... or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business."

In order to establish a prima facie case of handicap discrimination in employment under Chapter 151B, plaintiff must produce evidence showing that 1) he is a handicapped person, 2) in spite of his handicap, he is qualified for the position from which he was terminated, and 3) he was fired solely because of his handicap. Garrity v. United Airlines, Inc., 421 Mass. 55, 60 (1995).

With respect to the first element, plaintiff is "handicapped" within the meaning of the statute if he a) has a physical or mental impairment which substantially limits one or more major life activities, such as learning and working; b) has a record of hav-

ing such impairment; or c) is regarded as having such impairment. M.G.L. c.151B, §§ 1(17), 1(20). Reidy has submitted medical reports that indicate that he suffered, and continues to suffer, from mental impairments which substantially limit his ability to work. See Letter from Dr. Moretti to Travelers dated December 17, 1990; letter from Dr. Weiss to Joseph E. McGuire, Esq. dated December 10, 1991. The Court concludes that plaintiff has established the first element of his prima facie case.

In order to establish the second element, plaintiff must show that, despite his handicap, he was qualified for the position from which he was terminated. Section 1(16) of Chapter 151B defines a "qualified handicapped person" as "a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." An employer may, however, refuse to accommodate any handicap that necessitates the substantial modification of employment standards. Beal v. Board of Selectmen of Hingham, 419 Mass. 535, 542 (1995).

Plaintiff concedes that he was incapable of performing his previous job as a claims representative in the Auto Damage Unit after 1988, even with a 25% reduction in workload. Plaintiffs' Memorandum in Opposition at 7. Plaintiff, in fact, applied for and received disability benefits because he was unable to perform the material duties pertaining to his position. Nevertheless, Reidy contends that he was a "qualified handicapped person" because he was able to perform the job duties of a courier or filer during the relevant time period. Because Travelers did not offer him such a position, Reidy alleges that Travelers failed to provide reasonable accommodation to his handicap as required under state law. Id.

The Court is not persuaded by plaintiff's reasoning. By plaintiff's own admission, he was not, at any time between the day he left his position at Travelers to the present, capable of performing the duties of a claims representative. The question then is whether or not there is at least a genuine issue of material fact

that, if Travelers made reasonable accommodation to Reidy's handicap, he would have been able to perform that job. See August v. Offices Unlimited, Inc., 981 F.2d 576, 580 (1st Cir. 1992). Plaintiff basically argues that he would have been able to perform the essential job functions of a claims representative if defendant had offered him a position as a courier or filer. That argument is without logic. Furthermore, while employers may not deny an employee alternative employment opportunities that are reasonably available under the employer's existing policies, employers "are not required to find another job for an employee who is not qualified for the job he or she was doing...." School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987). Because plaintiff in this case admits that he could not perform any of the functions of a claims representative, regardless of accommodation, the Court concludes that plaintiff has failed to show that he was "qualified" for the position from which he was discharged.

Even if plaintiff had shown that he was a qualified handicapped person, he has not submitted any evidence that he was terminated solely because of his handicap, the third element of the prima facie case. To the contrary, plaintiff concedes that he could not have returned to his prior position because of his handicap.

For the reasons stated in this section as well as those stated above, the defendant's motion for summary judgment on plaintiff's handicap discrimination claim will, therefore, be ALLOWED.

3. Loss of Consortium and Loss of Nurture

The claims for loss of consortium by Reidy's wife and loss of nurture by Reidy's minor children are based upon the handicap discrimination claim in Count III. See Complaint at 71-84. Because the handicap discrimination claim will be dismissed, the loss of consortium and loss of nurture claims must also be dismissed. Furthermore, with respect to the former claim, under Massachusetts law, a loss of consortium claim can only be brought when a claimant's spouse has a valid tort claim. Sena v. Commonwealth, 417 Mass. 250, 264 (1994); Mouradian v. General Elec. Co., 23 Mass. App. Ct. 538, 544 (1987). There is

no such tort claim in this case.

Defendant's motion for summary judgment on Counts IV, V, VI, VII and VIII will, therefore, be ALLOWED.

ORDER

For the foregoing reasons, defendant's motion for summary judgment on all counts is ALLOWED.

So Ordered.

\s_____

Nathaniel M. Gorton
United States District Judge

DATED: June 3 , 1996

APPENDIX C

Rescript Opinions.

EILEEN ANDREWS VS. ARKWRIGHT MUTUAL INSURANCE COMPANY. December 5, 1996. *Massachusetts Commission Against Discrimination. Employment, Discrimination. Anti-Discrimination Law,* Sex.

A Superior Court judge allowed the defendant's motion for summary judgment. He determined that the plaintiff's complaint of sexual discrimination was untimely filed with the Massachusetts Commission Against Discrimination (MCAD). See G. L. c. 151B (1994 ed.). The plaintiff appealed. We transferred the case to this court on our own motion. We affirm.

Eileen Andrews began employment with Arkwright Mutual Insurance Company (Arkwright) in December, 1987. Throughout her tenure with Arkwright, her immediate supervisor was Esther Sprano.

Arkwright began a reorganization of their departments in early 1992. On January 14, 1992, Sprano announced to the communications department that two positions would likely be cut as a part of the reorganization process. Sprano crafted plans to shift responsibilities within the department and designed two plans: one where Andrews and another associate would be terminated and another where only Andrews would be terminated.

On January 23, 1992, Andrews informed Sprano that she was pregnant. Sprano responded, "What do you want me to do about it?" and also said, "I hate working with pregnant women." Approximately six days later, Andrews was terminated. She was the only person in the department to be terminated. Andrews hired a lawyer to pursue a claim that her termination was based on her pregnancy.

On May 21, 1992, Andrews's attorney sent a "letter of inquiry" to the MCAD, advising the agency that Andrews would be pursuing a claim against her former employer. She sought a hearing

date to discuss the merit of the claim. She also filed a claim in the Superior Court.

After a series of communications between Andrews's attorney and the MCAD, Andrews filed a complaint nunc pro tunc to May 21, 1992, the date of initial communication with MCAD. She was advised to do so by an employee of the MCAD. The general counsel of MCAD also wrote a letter which stated, "the Commission has determined to take no further action on this matter. The commission considers this case closed and the statute of Limitations issue is properly before the Court in which the civil action in this matter is now pending."

A plaintiff wishing to pursue a discrimination claim under G. L. c. 151B must first submit a complaint to the MCAD within six months of the alleged unlawful conduct. G. L. c. 151B, § 5; 804 Code Mass. Regs. § 1.03(2)(1993). The plaintiff conceded at oral argument that the initial inquiry letter was not a complaint.[1] This concession, absent a tolling of the statutory filing period, is fatal to her G. L. c. 151B claim.

The plaintiff next argues that the complaint should be permitted nunc pro tune based on equitable tolling. See Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 817 (1988) (holding equitable tolling available for G. L. c. 151B claims). Equitable tolling is available in circumstances in which the plaintiff is excusably ignorant about the six-month statutory filing period, Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 896 (1st Cir. 1992), or where the defendant or the MCAD has affirmatively misled the plaintiff. See, e.g., Toombs v. Greer-Smyrna, Inc., 529 F. Supp. 497 (M.D. Tenn. 1982), affd, 709 F.2d 1509 (6th Cir. 1983). Neither circumstance applies.

The plaintiff was represented by counsel two months before the statutory filing deadline of six months. Constructive knowl-

---

[1] A complaint must be signed by the party, notarized, and give sufficient detail of the act or acts of discrimination. 804 Code Mass. Regs. § 1.03 (1993). The inquiry letter did not meet these requirements. Additionally, the plaintiffs did not serve this letter on the defendant.

edge of all procedural requirements is imputed to a plaintiff who retains an attorney. See Mercado-Garcia v. Ponce Fed. Bank, supra; Conroy v. Boston Edison Co., 758 F. Supp. 54, 61 (D. Mass. 1991). There was no evidence that Arkwright engaged in any misconduct that may have dissuaded Andrews from filing a complaint. Equitable tolling is not available on that basis. There was no affirmative misleading by the MCAD. While the inquiry letter was not handled expeditiously, the obligation to file a complaint within the required time limit still rests with the attorney. On the record before us, the MCAD never gave erroneous information to Andrews or her attorney as to the correct filing date, nor did they refuse to accept a properly presented timely complaint.

Judgment affirmed.

Maryann C. Murphy for the plaintiff.
Lisa J. Damon (*Allan C. Cave, Jr.*, with her) for the defendant.

Supreme Court, U.S.
FILED
JUN 13 1997
OFFICE OF THE CLERK

No. 96-1799

In The

Supreme Court of the United States

October Term, 1996

GEORGE F. REIDY, TONI E. REIDY, TERRENCE M. REIDY, JOHN A. REIDY, BRIAN J. REIDY and GEORGE M. REIDY,

Petitioners,

vs.

TRAVELERS INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAY M. PRESSER
Counsel of Record
JEFFREY C. HUMMEL
SKOLER, ABBOTT & PRESSER, P.C.
Attorneys for Respondent
One Monarch Place, Suite 2000
Springfield, Massachusetts 01144
(413) 737-4753

71319 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

331

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Circuit Court of Appeals erred when it concluded that no material issue of fact existed regarding Petitioner George Reidy's failure to comply with the procedural prerequisites for bringing an action under the Massachusetts Fair Employment Practices Statute.

2. Whether the First Circuit Court of Appeals erred when it concluded that no competent evidence existed to establish that Petitioner George Reidy was not an employee at will.

3. Whether the First Circuit Court of Appeals erred when it found no material issue of facts regarding Petitioners' employment-related state tort claims.

RULE 29.6 STATEMENT

The following companies, subsidiaries and affiliates of Respondent Travelers Insurance Company have issued shares to the public:

Travelers Group, Inc.

Travelers Property Casualty Corp.

Smith Barney Mutual Funds Management, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Citations	iv
Statutory Provisions Involved	1
A. Procedural History	1
Misstatements In The Petition Regarding Petitioner's Compliance With The Procedural Requirements	2
Statement of the Case	5
Reasons for Denying the Writ	11
I. The Case Simply Does Not Present Any Legal Questions That Need To Be Resolved By The Supreme Court.	11
II. Petitioner's Breach Of Contract Claim Fails As A Matter Of Law.	12
III. Petitioner Failed To Comply With The Procedural Requirements Of M.G.L. Chapter 151B.	14

Contents

Page

IV. Petitioner's "Total Disability" Would Justify Summary Judgment On His Discrimination Claim. 16

V. Petitioners' Claims For Loss Of Consortium And Nurture Are Barred By M.G.L. Chapter 152, § 24. 20

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Agin v. Federal White Cement, Inc., 417 Mass. 669, 632 N.E. 2d 1197 (1994) 4

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 11

Andrews v. Arkwright Mutual Insurance Company, 423 Mass. 1021, 673 N.E. 2d 40 (1996) 15, 16

August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992) 17, 18, 20

Beal v. Board of Selectmen of Hingham, 419 Mass. 535, 646 N.E. 2d 131 (1995) 16, 17, 18

Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 646 N.E. 2d 111 (1995) 19

Contents

	Page
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	11
Charland v. Muzi Motors, Inc., 417 Mass. 580, 631 N.E. 2d 555 (Mass. 1994)	3, 4, 15
Cherella v. Phoenix Technologies, Ltd., 32 Mass. App. Ct. 919, 586 N.E. 2d 29 (1992)	14
Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 525 N.E. 2d 643 (1988)	14, 15
Clarke v. Kentucky Fried Chicken, 57 F.3d 21 (1st Cir. 1995)	21, 22
Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 607 N.E. 2d 1035 (1993)	17, 19
EEOC v. Green, 76 F.3d 19 (1st Cir. 1996)	15
Doe v. Purity Supreme, Inc., 422 Mass. 563, 664 N.E. 2d 815 (1966)	4
Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E. 2d 690 (1980)	21
Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E. 2d 1251 (1977)	13
Garrity v. United Airlines, 42 Mass. 55, 653 N.E. 2d 173 (1995)	14

Contents

Page

Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 429 N.E. 2d 21 (1981) 13

Green v. Wyman-Gordon Co., 422 Mass. 551, 664 N.E. 2d 806 (1966) 4, 22

Guzman v. Lowinger, 422 Mass. 570, 664 N.E. 2d 820 (Mass. 1996) 4

Hamilton v. Baystate Medical Educ. & Research Foundation, Inc., 866 F. Supp. 51 (D. Mass. 1994) 14, 21

Jackson v. Action for Boston Community Development, 403 Mass. 8, 525 N.E. 2d 411 (1988) 12

Kolodziej v. Smith, 412 Mass. 215, 588 N.E. 2d 634 (1992) 12

Labonte v. Hutchins & Wheeler, 424 Mass. 813, 678 N.E. 2d 853 (1997) 17

Maddaloni v. Western Massachusetts Bus Lines, Inc., 386 Mass. 877, 438 N.E. 2d 351 (1982) 13

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 92 S. Ct. 1917 (1973) 19

Mouradian v. General Electric Co., 23 Mass. App. Ct. 538, 503 N.E. 2d 1318 (1987) 22

Contents

	Page
O'Brien v. New England Telephone & Telegraph Co., 422 Mass. 686, 664 N.E. 2d 843 (1996)	12, 13
Pesterfield v. Tennessee Valley Auth., 941 F.2d 437 (6th Cir. 1991)	19
Smith Pfeffer v. Superintendent of the Walter E. Fernald State School, 404 Mass. 145, 533 N.E. 2d 1368 (1989)	13
St. Arnaud v. Chapdelaine Truck Center, Inc., 836 F. Supp. 41 (D. Mass. 1993)	21
St. Germaine v. Pendergast, 411 Mass. 615, 584 N.E. 2d 611 (1992)	21
Sereni v. Star Sportswear Mfg. Corp., 24 Mass. App. Ct. 428, 509 N.E. 2d 1203 (1987)	14
Wheelock College v. MCAD, 371 Mass. 130, 355 N.E. 2d 309 (1976)	19
Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994)	4
Statutes Cited:	
M.G.L. ch. 93, § 102	4
M.G.L. ch. 93, § 103	4

Contents

Page

M.G.L. ch. 151B 4, 14, 15, 16, 18, 19

M.G.L. ch. 151B, § 1(16) 19

M.G.L. ch. 151B, § 5 1

M.G.L. ch. 151B, § 9 ..... 1, 4

M.G.L. ch. 152, § 24 20

APPENDIX

Appendix A — Letter to Mr. George F. Reidy from Luther E. Allen, Jr. of the Commonwealth of Massachusetts Commission Against Discrimination Dated September 20, 1991 ..... 1a

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by the Petitioner, the Respondent adds:

> 1. M.G.L. ch. 151B, § 5: . . . Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination.
>
> 2. M.G.L. ch. 151, § 9: . . . Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing.

A. Procedural History

The district court, on June 3, 1996, as Petitioner asserts, did render summary judgment on all Petitioner's claims. As to the question of whether Petitioner filed a timely administrative charge with the state agency, the district court, for purposes of

the summary judgment motion, "assumed" that Petitioner had filed an administrative charge on August 30, 1991. It further found that Petitioner had still failed to comply with the procedural requirements for initiating a state civil action because Petitioner had neither waited ninety days before initiating the civil action nor obtained approval of the state anti-discrimination agency to proceed with a civil action before ninety days. The First Circuit Court did not reach the second procedural defect, finding that the record evidence made it clear that no timely charge of discrimination had been filed.

MISSTATEMENTS IN THE PETITION REGARDING PETITIONER'S COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS

Beyond excessive and unsupported hyperbole in the Statement of the Case, the Petition contains critical misstatements regarding several dispositive procedural matters that led to the summary judgment issued both by the First Circuit Court of Appeals and, on an alternative basis, by the district court. Thus, Petitioner asserts that he sent an administrative charge to the Massachusetts Commission Against Discrimination ("MCAD"), the Commonwealth's fair employment practices agency, on August 30, 1991, and that "[t]he MCAD sent back a form letter on September 20, 1991 *acknowledging receipt of the charge*." Pet. at 14-15 (emphasis added). In fact, while a letter was sent to Petitioner and his counsel by the MCAD on or about September 20, 1991, the letter stated just the opposite.[1]

Documents produced in discovery, and submitted both in support of and in opposition to the Motion for Summary Judgment, reflect a putative charge of discrimination, as well as an unsigned cover letter to the Massachusetts Commission Against Discrimination, dated August 30, 1991, on the letterhead

1. A copy of the letter is attached to this Opposition as Appendix A.

of Petitioner's counsel. The putative charge was not date-stamped and contained no docket number. There was a claim, but no record evidence, that the letter was ever sent.[2] Moreover, the aforementioned September 20, 1991 letter from the MCAD acknowledged receipt of a *letter* but specifically stated that if Petitioner wanted to pursue a claim of discrimination, its rules required that a "formal complaint be filed with the agency." Thus, not only was there no letter "*acknowledging receipt of the charge*" as the Petition alleges, the September 20 letter, as noted by the First Circuit Court, placed Petitioner and his counsel on notice that there had been no charge filed. The record also contains admissible evidence from the MCAD (as well as the Equal Employment Opportunity Commission) that they had no record of any charge of discrimination ever being filed by Petitioner, as well as evidence from Respondent that it was never served with any administrative charge of discrimination.

The Petition also *incorrectly* asserts that under the state law "A person who sends a charge of discrimination with the MCAD had the right to immediately withdraw the charge in order to file a private lawsuit in accordance with the Laws of Chapter 151B, § 9." Petition at 15. As is clear from the expressed language of the statute, there simply is no right to *immediately* pursue a lawsuit once a charge has been filed. Rather, the statute precludes the filing of a civil action until ninety days have passed since the filing of the charge, unless the MCAD has approved, in writing, an earlier filing. This procedure, which allows for the charge to be dealt with, in the first instance, by the state's anti-discrimination agency, has been recognized by the Commonwealth's Supreme Judicial Court. *Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 584, 631 N.E. 2d 555, 557 (Mass.

---

2. Thus, the record does not contain an affidavit from counsel or anyone in counsel's office stating, under oath, that the materials were submitted to the MCAD.

1994) (. . . under M.G.L. ch. 151B, § 9, a person claiming discrimination "may maintain a civil action only if she has previously filed a timely complaint with the [MCAD] and ninety days have passed (or a commissioner has assented to an earlier filing). As found by the district court, it was undisputed that even if the August 30, 1991 charge was filed with the MCAD, the instant civil action was commenced *before* the expiration of ninety days and *without* the specific approval of the MCAD.

Furthermore, the Complaint in the instant case alleged *age* discrimination under M.G.L. ch. 151B. Petitioner's handicap discrimination claim was brought under an entirely different statute, M.G.L. ch. 93, § 103. However, state law makes it clear that when, as here, discrimination claims would have been actionable under M.G.L. ch. 151B, there is no independent avenue of relief under the alternative statute or common law. *See Guzman v. Lowinger,* 422 Mass. 570, 664 N.E. 2d 820 (Mass. 1996) ("[W]here M.G.L. c. 151B applies, its procedural prerequisites may not be bypassed by reconstituting a sexual harassment claim as a violation of the civil rights act or the Massachusetts Equal Rights Act, M.G.L. c. 93, § 102 (1994 ed) or as a new common law claim."). *Green v. Wyman-Gordon Co.*, 422 Mass. 551, 555, 664 N.E. 2d 806, 811 (1966); *Doe v. Purity Supreme, Inc.*, 422 Mass. 563, 567, 664 N.E. 2d 815, 819 (1966) (refusing to create a common law exception to the exclusivity of the Workers' Compensation Act). The same rationale applies with equal force to Petitioner's handicap discrimination claim filed under M.G.L. ch. 93, § 103. *See also Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 631 N.E. 2d 555 (Mass. 1994); *Agin v. Federal White Cement, Inc.*, 417 Mass. 669, 672, 632 N.E. 2d 1197 (1994). *See also Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) (Chapter 151B was the exclusive remedy for state law employment discrimination complaints).

STATEMENT OF THE CASE

The principal Petitioner, George Reidy ("Petitioner" or "Reidy"), was born on July 20, 1941. In 1973, Petitioner became a unit supervisor in the Subrogation Unit.[3]

In 1983, Travelers closed its Springfield, Massachusetts office, and its workload was absorbed by the Worcester office. Reidy claimed that this development increased his workload and that the office was understaffed.

In 1985, John Honore became Petitioner's manager. Honore was older than Petitioner, and the two had a good working relationship between 1985-1987. However, when Honore did nothing to respond to Reidy's complaints regarding perceived understaffing, computer problems, and caseload, Reidy began to believe that Honore was perpetuating the alleged mistreatment to which Reidy had been subjected under his prior manager.

Honore was not satisfied with Petitioner's performance and had pointed out problems. In particular, while Petitioner was on vacation in 1987, Honore had reviewed numerous case files and noted that in many cases Reidy had let the statute of limitations run. Reidy was criticized by Honore for his oversight of these files, as well as for taking long and excessive coffee breaks, long lunches, and making personal phone calls.

Although Petitioner contends that the Subrogation Unit was intentionally understaffed in an effort to have him fail, thereby

---

3. Petitioner and his supervisor disagreed about the quality of his work. Thus, in 1978, prior to Petitioner's reaching the age of forty and not suffering any disability, the supervisor placed Reidy on probation. In response, Reidy engaged an attorney who wrote the supervisor a letter, threatening a lawsuit against Smith personally if he persisted. The supervisor rescinded the probation.

seemingly justifying his termination, when Honore's displeasure with the unit reached a point that a change was to be made, Petitioner was *not* terminated. Rather, when in August of 1987, Reidy was removed as Subrogation Unit Head, he was made a claims representative within the Auto Damage Unit, while retaining his previous title and salary.

During the time Petitioner worked in the Auto Damage Unit, his new managers were likewise not satisfied with Reidy's ability to handle his cases and his slow-learning curve. Although, in retrospect, Petitioner believes that there was a nexus between his still unknown mental condition and his performance shortcomings, at the time Reidy never suggested to anyone at Travelers that he had a medical condition which interfered with his ability to perform his duties or which required any accommodation.

On or about June 1, 1988, Honore and Harold Miller, Assistant Manager in the Auto Damage Unit, advised Reidy that he had sixty days to improve his performance or face being placed on final warning. On or about August 17, 1988, Reidy was verbally informed that he was going to be placed on a final warning, which meant he would have to improve within the next sixty days or face termination.

While Reidy claims that one of the factors for Honore trying "to get him" was his age, he had no actual knowledge of employees being discriminated against because of age or handicap. There was absolutely no record evidence supporting any claim of a pattern of forcing out older workers.

Reidy was away from work on August 26 and 29, 1988 on vacation days, but he did not report to work on his scheduled date of return, August 30. In fact, he never again performed any work for Travelers *or sought* to return to his position. Rather, after several weeks of calling in sick, Reidy requested a medical

leave of absence and filed for disability benefits, claiming total disability. This request was granted, and Reidy was paid disability payments pursuant to Respondent's Sick Leave Plan, based on his total disability.

In August of 1989, Reidy began working as a courier for A & S Delivery Services. However, Reidy never informed Travelers that he was working.[4]

On or about November 5, 1990, Dr. Felsenfeld of Travelers advised Reidy that his doctor, Dr. Mario Moretti, had indicated that he was capable of light duty, and Reidy was asked to return to work on November 19, 1990. However, Reidy informed Respondent that he could *not* return to his prior position. According to Petitioner, while he requested that he be given a less stressful job, such as a courier position, he did *not* ask for an accommodation that would have allowed him to perform his own position. Moreover, contrary to the assertion in the Petition that "Travelers had other positions that he could perform" (Petition at 24), Petitioner admitted at deposition that the Worcester office did *not* employ any couriers and that he was not aware of any such vacancy anywhere in the company.

Travelers proposed that Reidy return to a modified position that was intended to eliminate as much stress as possible. Thus, to reduce stress, it was proposed that Petitioner return to the Subrogation Unit, where he would not have to deal directly with customers, and where he would be given a reduced workload of only seventy-five (75%) percent of the workload for a representative in that unit. However, Petitioner's physician, Dr. Moretti, determined that Reidy was not physically or mentally capable of handling the modified position.

---

4. Petitioner asserts that he did tell Dr. Parenty, a physician performing an independent medical examination ("IME") on behalf of the Respondent, that he was working and "thought that he [Dr. Parenty] would tell them [Travelers]."

Under the terms of the disability plan, eligibility ceases when the employee "engages on a substantial basis in any occupation or employment for wage or profit." As a courier for A & S Delivery Services, Petitioner had been working between twenty-eight (28) and forty-five (45) hours per week for wages. Accordingly, on February 14, 1991, Travelers informed Reidy that it had recently learned that he was working as a courier, and that as a result, under the terms of the plan, his disability benefits would be discontinued as of March 4, 1991. Travelers notified Reidy that he would be placed on unpaid leave effective March 4, 1991, and his position would remain open for four weeks. If he did not report to work at such time, Travelers would assume that he had terminated employment.

By letter dated March 12, 1991, Travelers agreed to extend his sick leave benefits for an additional two weeks through March 22, 1991, "in order to allow him time to review the . . . [Sick Leave] Plan." In addition, the letter informed Reidy that his unpaid leave would now commence as of March 25, 1991, and extend for four weeks from that date. Should Reidy not return to work at the end of that period, Travelers would consider that he had terminated his employment.

In a confirmatory letter dated March 28, 1991, Travelers again informed Reidy that because he had not returned to work by March 25, 1991, as outlined in the March 12, 1991 letter, Reidy's disability benefits had been discontinued pursuant to the express terms of the plan, as he was working for wage or profit. The letter also noted that he would be placed on unpaid leave for four weeks and that if he did not return at that time, he would be terminated.

On April 13, 1991, Reidy requested that his unpaid leave be extended to June 1, 1991. His request was allowed. Throughout this period, Reidy was given the opportunity to

return from leave, but could not or would not do so. Therefore, on June 1, 1991, his employment was terminated. The courier position itself proved too much for Reidy, and he quit that position shortly thereafter.

On or about October 10, 1991, Petitioner commenced this action against Travelers. Reidy also initiated a claim for Workers' Compensation benefits. On May 25, 1995, Judge Solomon issued a decision in the Workers' Compensation case. She found that his "emotional condition renders him incapacitated for any gainful employment" and that the incapacity was work related and compensable. She concluded that:

> the Employee is incapable of functioning in a work environment. I further find the Employee's incapacity to be total, with the exception of that period during which the employee attempted to work in a non-stressful situation.

The payments Petitioner is receiving pursuant to the decision of Judge Solomon *exceed* that which he would have received had his disability benefits not been terminated.

During his employment, Reidy received an employee handbook. The applicable Travelers' Employee Handbook states as follows:

> The Employee Handbook is designed to familiarize you with The Travelers' current personnel policy guidelines. It is a summary of guidelines for informational purposes only and should not be considered in any way as creating any rights, contract or guarantee of employment, of benefits, or of working

conditions between the employee and the company. At any time the company may change, supplement, or discontinue these guidelines.

The Travelers has a longstanding history of good employee relations, and the guidelines described in this handbook are intended to continue that tradition. At the same time, just as you have the right to leave your job here at the Travelers if you want to, for any reason at all or for no reason, and with or without advance notice, the company retains the same right as to termination of your employment. Thus, no Travelers manager or other person at the company has the authority to make a commitment of guaranteed or continuing employment to you, and no Travelers publication should be understood to make any such guarantee.

* * *

Both you and The Travelers are free to terminate your employment at any time, for any or no reason, and with or without advance notice.

REASONS FOR DENYING THE WRIT

I.

THE CASE SIMPLY DOES NOT PRESENT ANY LEGAL QUESTIONS THAT NEED TO BE RESOLVED BY THE SUPREME COURT.

It is obvious that this case presents no federal question whatsoever. It was brought, and decided, solely based upon state law. There is no conflict with any other circuit court decision or federal statute or constitutional provision that needs to be interpreted.

The decision is of no precedential value, as is reflected in the fact that the decision of the First Circuit Court of Appeals is an *unpublished* decision. Furthermore, the decision is fact specific, turning on the review of the admissible record evidence presented to the motion judge, a review more appropriately left to lower courts.

Moreover, the First Circuit and, utilizing an alternative theory, the district court, properly applied the state law of the Commonwealth of Massachusetts, carefully reviewed the record evidence, and properly decided that there were no "specific facts showing there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). There is no reason to grant certiorari.

II.

PETITIONER'S BREACH OF CONTRACT CLAIM FAILS AS A MATTER OF LAW.

The general rule in Massachusetts is set forth in *Jackson v. Action for Boston Community Development*, 403 Mass. 8, 9, 525 N.E. 2d 411 (1988):

> [W]here an employment contract, whether express or implied, contains no definite period of employment, it establishes employment at will . . . Employment at will is terminable by either the employee or the employer without notice for almost any reason or for no reason at all.

Accord, Kolodziej v. Smith, 412 Mass. 215, 221-222, 588 N.E. 2d 634 (1992). Contrary to assertions in the Petition, Reidy admitted at deposition that nothing bound him to remain with the company for a fixed period of time, nor did Travelers make any guarantees to him that he would be employed for a fixed period of time. He was not told that he would only be discharged for just cause.

While Respondent had an employment manual, the manual could not be construed to create anything other than an at-will relationship. Thus, under Massachusetts law, the manual's expressed retention of the right to unilaterally change the manual weighs against its being part of an employment contract.[5]

---

5. *Compare O'Brien v. New England Telephone & Telegraph Co.*, 422 Mass. 686, 664 N.E. 2d 843 (1996), where the Massachusetts Supreme Judicial Court held that an implied contract of employment had been created based on the company's personnel manual because, unlike Travelers, the company did not reserve the right to unilaterally change the provisions of the manual or discharge any employee without cause.

Moreover, even if the terms of the handbook were deemed part of his employment contract, it does not assist Petitioner, since it provides specifically that "[b]oth you and The Travelers are free to terminate your employment at any time, for any or for no reason, and with or without advance notice." A contract that "reserve[s] to the parties an explicit power to terminate without cause on written notice" is a "classic terminable at will employment contract." *Fortune v. National Cash Register Co.*, 373 Mass. 96, 101, 364 N.E. 2d 1251 (1977). While Petitioner cites *O'Brien v. New England Telephone & Telegraph Co.*, 422 Mass. 686 (1996) to buttress his claim, in light of what was actually conveyed by the expressed language of this manual, that case does not support his position. Indeed, in *O'Brien* the Supreme Judicial Court noted, "[o]f course, the provisions of a personnel manual on analysis may grant no rights." *O'Brien*, *supra*, at 848. Thus, the manual here not only established that Reidy was an employee at will, it also expressly states that no individual manager had authority to alter that relationship.

Massachusetts courts have repeatedly declined to create an implied just cause requirement.[6] *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 671, 429 N.E. 2d 21 (1981); *Smith Pfeffer v. Superintendent of the Walter E. Fernald State School*, 404 Mass. 145, 150, 533 N.E. 2d 1368, 1371 (1989). There simply was no evidence submitted, which, even if credited, would have overcome the presumption that Petitioner remained an employee

---

6. Under Massachusetts law, a breach of the implied covenant of good faith and fair dealing exists when the discharge of an at-will employee deprives that employee of compensation earned *prior to* the discharge. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 101, 364 N.E. 2d 1251 (1977); *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659 (1981) (Gram I); *Maddaloni v. Western Massachusetts Bus Lines, Inc.*, 386 Mass. 877, 438 N.E. 2d 351 (1982). There is no claim here that Petitioner was not paid, in full, for work he performed.

at will, subject to termination at any time for virtually any reason.[7]

III.

PETITIONER FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF M.G.L. CHAPTER 151B.

The comprehensive administrative scheme as set forth in M.G.L. ch. 151B requires that *all* claims regarding employment, *including discrimination*, be filed with the Massachusetts Commission Against Discrimination ("MCAD") *before* a complainant may seek access to the court. *Sereni v. Star Sportswear Mfg. Corp.*, 24 Mass. App. Ct. 428, 430, 509 N.E. 2d 1203 (1987); *Cherella v. Phoenix Technologies, Ltd.*, 32 Mass. App. Ct. 919, 920-921, 586 N.E. 2d 29 (1992); *Christo v. Edward*

---

7. Furthermore, even if Petitioner had an implied employment contract, summary judgment was appropriate when the facts show that the Petitioner could not reasonably expect to prove that his termination was without just cause. *Garrity v. United Airlines*, 42 Mass. 55, 63, 653 N.E. 2d 173, 178 (1995). Under Massachusetts Law:

> absent contractual definition in the context of the contract, "just cause" means an employer can discharge an employee if [T]here existed (1) a reasonable basis for employer dissatisfaction with a[n] . . . employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior, or (2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of his business.

Hamilton v. Baystate Medical Educ. and Research Foundation, Inc., 866 F. Supp. 51, 55 (D. Mass. 1994).

G. Boyle Ins. Agency, Inc., 402 Mass. 815, 817, 525 N.E. 2d 643 (1988); *Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 631 N.E. 2d 555 (Mass. 1994).

This proposition was reaffirmed by the decision of the Supreme Judicial Court, during the pendency of this appeal, in *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021, 673 N.E. 2d 40 (1996), wherein the court dismissed a civil action because the plaintiff had filed an inquiry letter, but not a formal charge of discrimination, with the MCAD. Petitioner asserts *Arkwright* is distinguishable because here a charge was filed. The record simply did not support that claim. Rather, as earlier noted, in the instant case the record reflects that the agency itself, following a due and diligent search, found no evidence of any charge ever being filed.[8] The Respondent was never served with any charge of discrimination prior to the initiation of this action. There was no administrative investigation or conciliation process prior to litigation. The Petitioner took no action after being informed by the MCAD that he would need to file a formal charge for the agency to act. Under these circumstances, the Petitioner has simply not produced a sufficient quantum of evidence that would allow a reasonable factfinder to conclude that a charge of discrimination had been filed with the MCAD, and the First Circuit properly concluded that Petitioner's claim under M.G.L. ch. 151B was barred.

Furthermore, even assuming, *arguendo*, that a charge of discrimination was filed on or about August 30, 1991, as the district court properly found, summary judgment was appropriate because the instant action was filed within ninety

8. *Contrast EEOC v. Green*, 76 F.3d 19 (1st Cir. 1996) (the *parties'* competing affidavits regarding whether a charge of discrimination had been filed created a genuine issue of material fact precluding summary judgment.). In this case, the sworn testimony of officials from the EEOC and the MCAD demonstrate that a charge was never filed at either agency.

days of the filing of that charge, and without the authorization of the MCAD, contrary to the requirements of the statute. This court should not take jurisdiction when there are two alternative fatal procedural defects to Petitioner's pursuit of the action, caused solely by Petitioner's conduct.[9]

IV.

PETITIONER'S "TOTAL DISABILITY" WOULD JUSTIFY SUMMARY JUDGMENT ON HIS DISCRIMINATION CLAIM.

Even if not doomed by multiple procedural defects, summary judgment would have been appropriate. The undisputed facts demonstrate that since September 1988, almost three years before his termination, Petitioner was unable to perform the essential duties of his job. This is clear, based upon Petitioner's request for medical leave, his attendant statements, his application for and receipt of disability benefits from 1988 through 1991, Petitioner's declining to return to work even to a substantially modified, lower stress job, the medical documentation produced by his own physicians, and his deposition testimony. These facts show that he could not do his job and establish that Petitioner is not a qualified handicapped individual within the meaning of M.G.L. ch. 151B. *Beal v. Board of Selectmen of Hingham*, 419 Mass. 535, 646 N.E. 2d 131, 137

---

9. The Petitioner continues to blame the agency, although there is no explanation for his failure to file (or refile if he had) a charge when the MCAD indicated that a formal charge was necessary. Nor can the MCAD be blamed for the Petitioner's filing of a civil suit prior to ninety (90) days from the alleged filing. There is no evidence he had even requested permission from the MCAD to proceed to file a civil suit within the ninety-day period, as required. As under federal law, under state law constructive knowledge of all procedural requirements is imputed to a plaintiff who retains counsel. *Andrews v. Arkwright Mut. Ins. Co., Inc., supra.*

(1995); *Cox v. New England Tel. & Tel. Co.*, 414 Mass. 375, 381-384, 607 N.E. 2d 1035 (1993); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, at 587 (1st Cir. 1992).[10] Petitioner sought and received benefits for total disability beginning in 1988 and continuing thereafter. The recently-decided case, *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 678 N.E. 2d 853 (1997), while finding that the receipt of disability pay in that case did not preclude recovery, reinforces the proposition that an individual who, like Petitioner, claims and receives benefits because he is "totally disabled" is not a qualified handicapped employee. The court upheld the determination of discrimination determining that the jury could find, based upon a variety of facts, that the Petitioner was not claiming to be totally disabled, just that he needed an accommodation to perform his own job.[11] The court contrasted this to the factual situation in *August v. Offices Unlimited, Inc.*, 981 F.2d 576, at 587 (1st Cir. 1992) where the claim was for "total disability," barring a potential finding that the employee was nevertheless a qualified handicapped employee. The Supreme Judicial Court noted:

> A distinction from *Beal v. Selectmen of Hingham*, 419 Mass. 535 (1995), and *August*

---

10. Petitioner sought and received disability payments first under the Travelers' Disability Plan, beginning in 1988, and later under the Workers' Compensation Act.

11. The court noted that "there was evidence to show that the plaintiff was capable of working a fifty-five hour week when allowed to utilize a flexible schedule and when his expected amount of walking was limited," and that the essential functions of that job could be performed within that schedule. It further noted that "[O]n the form on which the plaintiff filed his claim for benefits, he stated that he was in need of a flexible work schedule. This request for accommodation, never considered by the law firm, was evidence that the plaintiff *was not claiming to be totally disabled.*" *Id.* (emphasis added).

> *v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992), is that plaintiffs who eliminate a disputable issue of fact by claiming total disability may lose the fight to pursue a discrimination claim. See *Leatherwood v. United Parcel Serv.*, 708 S.W. 2d 396 (Tenn. Ct. App. 1985); *Grauer v. Occidental Life Ins. Co.*, 363 So. 2d 583 (Fla. Dist. Ct. App. 1978).

Id. at n. 8.

The present case is almost identical to *August* and *Beal*, both cases decided under M.G.L. ch. 151B. Like the plaintiffs in those cases, Reidy claims that he is a handicapped person and that Travelers discriminated against him because of that handicap when it terminated him. However, Reidy's statements attesting to his disabled condition, accompanied by the confirming reports of his several doctors, leave no doubt that Reidy is a "totally disabled person."[12] As a totally disabled person, Reidy would be unable to establish an essential element of his handicap discrimination claim, *i.e.*, that he is capable of performing the essential functions of his job with reasonable accommodation to his handicap.

Reidy's incapacity to perform any work also is dispositive of any claim that the 1991 termination was unlawful due to age. Since Petitioner was not capable of working in 1991, and was not performing his job to his employer's satisfaction when he

---

12. In her award of total disability Workers' Compensation benefits, Judge Dianne L. Solomon, Administrative Judge of the Department of Industrial Accidents held: "I adopt the medical opinions of Doctors Moretti, Weiss, and Polizoti and find that the employee is incapable of functioning in a work environment. I further find the employee's incapacity to be total, with the exception of that period during which the employee attempted to return to work in a non-stressful environment."

was discharged for not returning to work, he cannot even meet the minimum burden of establishing a *prima facie* case under M.G.L. ch. 151B. *Wheelock College v. MCAD*, 371 Mass. 130, 355 N.E. 2d 309 (1976), adopting *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 92 S. Ct. 1917 (1973). Furthermore, in spite of Reidy's age, Respondent clearly sought to have Petitioner return to his position, and discharged him only when it was clear he would, or could not.[13] If the former, Petitioner simply abandoned his position. If the latter, Petitioner was not a qualified handicapped individual.[14] M.G.L. ch. 151B, § 1(16); *Cox v. New England Tel. & Tel. Co.*, 414 Mass. 375, 381-384, 607 N.E. 2d 1035 (1993).

The only request for accommodation, coming at the end of his employment, was a request for a "stress free" environment. An employer is not obligated, and likely cannot, create a stress-free environment for the employee suffering from an emotional disorder. *See Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 442 (6th Cir. 1991) (employer not required to provide a "stress-free environment" or immunize employee from legitimate, job-related criticism). Employers:

> are not required to find another job for an

---

13. Petitioner strenuously argues for application of the summary judgment standard established by the Massachusetts Supreme Judicial Court in *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass. 437, 646 N.E. 2d 111 (1995), and claims that it was not followed. However, neither the district court nor the circuit court applied a "pretext plus" standard. Petitioner has not pointed to any evidence that would allow for the conclusion that Respondent's articulated reason for terminating Petitioner, his inability to work, was a pretext.

14. Petitioner has never identified any accommodation that would have allowed him to return to his position in 1991. Rather, Petitioner admitted and the district court properly held that there was no reasonable accommodation that would have enabled Petitioner to perform his job.

> employee who is not qualified for the job he or she was doing. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n. 19, 107 S. Ct. 1123, 1131 n. 19, 94 L. Ed. 2d 307 (1987). Employers are only required not to deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

August v. Offices Unlimited, Inc., 981 F.2d 576, at 587 (1st Cir. 1992). Contrary to his bald assertions, Petitioner produced no evidence that Respondent, which was in the midst of large-scale downsizing, had vacancies in positions that Petitioner could perform, or that he was denied the opportunity to transfer, pursuant to the employer's policies, based upon his handicap or age. Accordingly, the termination of Petitioner's employment nearly three years after he ceased being able to perform his job was not unlawful discrimination. Summary judgment would be justified on the merits as well as the procedure.

V.

PETITIONERS' CLAIMS FOR LOSS OF CONSORTIUM AND NURTURE ARE BARRED BY M.G.L. CHAPTER 152, § 24.

Petitioners'[15] continued claim for loss of consortium and support fly in the face of clear statute and findings of the courts of the Commonwealth. Petitioners' claims for loss of consortium and loss of nurture are barred by M.G.L. ch. 152, § 24, the exclusive remedy of the Workers' Compensation Act. This section states that if an employee fails to notify his employer by writing, at the time of his contract of hire, that he reserves

---

15. The tort claims are brought by Reidy's spouse and children.

his right of action at common law with respect to an injury compensable under said chapter, then the law deems that *the employee has waived that right.* The section further provides that if the employee has waived his right of action at common law, then the employee's

> spouse, children, parents and any other member of the employee's family or next of kin who is wholly or partly dependent upon the earnings of such employee at the time of injury . . . *shall also be held to have waived any right* created by statute, at common law . . . against such employer, including, but not limited to . . . loss of consortium, parental guidance. . . .

(Emphasis added.) *See St. Germaine v. Pendergast*, 411 Mass. 615, 584 N.E. 2d 611 (1992) (the claims of spouses, children, and parents are equally barred by "exclusive remedy" of Workers' Compensation Act); *St. Arnaud v. Chapdelaine Truck Center, Inc.*, 836 F. Supp. 41 (D. Mass. 1993) (Workers' Compensation Act barred spouse's claim for loss of consortium); *Hamilton v. Baystate Medical Educ. & Research Foundation, Inc.*, 866 F. Supp. 51 (D. Mass. 1994) (loss of consortium claim is precluded by exclusive remedy section of state Workers' Compensation Act).

Indeed, in response to the *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E. 2d 690 (1980) decision cited by Petitioner, the Legislature for the Commonwealth amended in 1985 the exclusivity provisions to bar consortium and support claims, as well as other employment tort claims. Courts have been unwilling to allow the circumvention of the Legislature's 1985 amendments expanding the employer's protections against tort claims by employees. *See Clarke v.*

Kentucky Fried Chicken, 57 F.3d 21 (1st Cir. 1995). More recently, the Supreme Judicial Court, based on similar reasoning, has found common law claims arising out of sexual harassment to be barred by the exclusivity provisions of the Workers' Compensation Act. *Green v. Wyman Gordon Company*, *supra*. The circuit court did not err when it did not allow claims by the family of this Petitioner, in direct contravention of the statutory mandate.

Furthermore, the Massachusetts courts have determined that discriminatory termination is not the type of tort against a spouse that would even allow for recovery of consortium or loss of nurture claims. *See Mouradian v. General Electric Co.*, 23 Mass. App. Ct. 538, 503 N.E. 2d 1318, 1321 (1987) (dismissing consortium claim in employment discrimination case where no valid tort claim existed). Thus, both the district court and the circuit court were correct in dismissing these claims for the alternative reason that, even if not barred by the exclusivity provisions of the Workers' Compensation Act, there has been no tort against George Reidy that would support an independent claim of consortium and loss of nurture by his family.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

JAY M. PRESSER
Counsel of Record
JEFFREY C. HUMMEL
SKOLER, ABBOTT & PRESSER, P.C.
Attorneys for Respondent
One Monarch Place, Suite 2000
Springfield, Massachusetts 01144
(413) 737-4753

APPENDIX A — LETTER TO MR. GEORGE F. REIDY FROM LUTHER E. ALLEN, JR. OF THE COMMONWEALTH OF MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION DATED SEPTEMBER 20, 1991

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION
1 ASHBURTON PLACE, BOSTON 02108

Administrative Services: 727-3990
September 20, 1991

Mr. George F. Reidy
46 Browing Road
Shrewsbury, MA 01545

RE: Reidy v. The Travelers Companies

Thank you for your letter outlining your allegations of discrimination. This information may prove very useful in helping the Commission to understand your claim.

However, the Commission's rules require that you must file a formal complaint in order for us to have the power to act further on your claim. Before we can take your complaint and begin an investigation, a Commission representative needs to meet with you to discuss your situation further.

To discuss your case, come to the Commission's office at any time Monday through Friday, from 9:00 a.m. to 4:30 p.m. Enclosed you will find a brochure that will explain to you how the procedures at the Commission work.

I look forward to meeting you, and hope that I can be of some service to you.

Sincerely,

s/ Luther E. Allen, Jr.
Luther E. Allen, Jr.
Compliance Officer

cc: Frederick T. Golder, Esquire
Bernstein, Golder & Miller P.A.
230 Broadway — Suite 103
Lynnfield, MA 01940-2383

Supreme Court, U.S.
FILED
JUL 31 1997
CLERK

No. 96-1799

IN THE

Supreme Court of the United States

October Term, 1996

GEORGE F. REIDY, TONI E. REIDY,
TERRENCE M. REIDY, JOHN A. REIDY,
BRIAN J. REIDY, AND GEORGE M. REIDY,
Petitioners,

v.

TRAVELERS INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

FREDERICK T. GOLDER
BERNSTEIN, GOLDER & MILLER, P.A.
230 BROADWAY, SUITE 104
LYNNFIELD, MASSACHUSETTS 01940
(617) 592-4000

Counsel for Petitioners

40 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Citations i

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

Andrews v. Arkwright Mutual Insurance Company, 423 Mass. 1021 (1996) 5, 6

August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992) 11

Charland v. Muzi Motors, Inc., 417 Mass. 580 (1994) 6

Christo v. Edward G. Boyle Insurance Agency Inc., 402 Mass. 815, 817 (1988) 4, 6

Commonwealth v. Crosscup, 369 Mass. 228, 242 (1975) 4

LaBonte v. Hutchins & Wheeler, 424 Mass. 813 (1997) 11

Mouradian v. General Electric Co., 23 Mass. App. Ct., 503 N.E. 2d 1318 (1987) 11

Statutes Cited:

M.G.L. ch. 151B, § 9 2

APPENDIX

Appendix A - Letter From Frederick T. Golder To Massachusetts Commission Against Discrimination, Dated August 30, 1991 ..... 1a

Appendix B - Charge of Discrimination Signed Under Oath By George F. Reidy, Submitted With The Letter Dated August 30, 1991 ..... 2a

Appendix C - Form Letter To Mr. George F. Reidy From Luther E. Allen, Jr., Of The Commonwealth Of Massachusetts Against Discrimination, Dated September 20, 1991 ..... 4a

Appendix D - Letter From Attorney Golder Dated September 26, 1991, To Mr. Luther E. Allen, Jr 5a

Appendix E - Second Form Letter To Mr. George F. Reidy From Luther E. Allen, Jr. Of The Commonwealth Of Massachusetts Against Discrimination, Dated September 20, 1991, Identical To First Form Letter And Sent After Attorney Golder's September 26, 1991 (Appendix D) 6a

Appendix F - February 14, 1991, Letter From Jeanne E. Erickson Of The Travelers To George F. Reidy 7a

Appendix G - Affidavit of George F. Reidy 8a

Appendix H - The Traveler's Memorandum Dated November 19, 1990, Concerning George F. Reidy 23a

Appendix I - The Travelers Memorandum Dated November 19, 1990, Concerning George F. Reidy 24a

No. 96-1799

IN THE

Supreme Court of the United States

October Term, 1996

GEORGE F. REIDY, TONI E. REIDY,
TERRENCE M. REIDY, JOHN A. REIDY,
BRIAN J. REIDY, AND GEORGE M. REIDY,

Petitioners,

v.

TRAVELERS INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

This Reply Brief is submitted in accordance with Rule 15(6) to address and dispute some of the points raised in Respondent's Brief in Opposition.

The United States Court of Appeals for the First Circuit must give "full faith and credit ... to the public acts, records, and judicial proceedings ..." of Massachusetts as required by Article IV, §1 of the United States Constitution.

The statement in Respondent's Brief at p. 2 "that Petitioner had still failed to comply with the procedural requirements for initiating a state civil action because Petitioner had neither waited ninety days before initiating the

civil action nor obtained approval of the state anti-discrimination agency to proceed before ninety days" is not a full or complete statement of Massachusetts law.

The Respondent reproduced a portion of G.L. c. 151B §9, but failed to include the section which states "... An aggrieved person may also seek temporary injunctive relief in the superior ... court ... at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission." (Emphasis supplied).

It is clear that the Petitioner, George F. Reidy ("Reidy"), did not have to wait 90 days, after "the filing of a complaint with the commission" before filing his lawsuit in the state superior court.

The holdings of the District Court, the Court of Appeals, and the statements contained in Respondent's Brief in Opposition regarding procedural issues are contrary to Massachusetts law.

The statement in Respondent's Brief at p. 2 concerning the finding that "The First Circuit Court did not reach the second procedural defect, finding that the record evidence made it clear that no timely charge of discrimination had been filed," is an incomplete statement of Massachusetts law. The facts as to the correspondence between the Massachusetts Commission Against Discrimination ("MCAD") and Petitioner's counsel are also incomplete.

Since this was a motion for summary judgment, under Massachusetts law, all facts and reasonable inferences had to be found in favor of Reidy.

By letter dated August 30, 1991, Reidy, through counsel, mailed a copy of a notarized charge of discrimination

outlining all of the discriminatory allegations. The MCAD sent back a form letter dated September 20, 1991, acknowledging receipt of the August 30, 1991 letter containing Reidy's notarized charge. That first form letter from the MCAD was received on September 24, 1991. Since Reidy had filed no letter outlining allegations of discrimination, and since the only statement outlining the statement of discrimination was stated on the notarized charge of discrimination, the only reasonable inference to be drawn is that the MCAD received the charge of discrimination on or about August 30, 1991.[1]

A person who sends a charge of discrimination with the MCAD has the right to immediately withdraw the charge in order to file a private lawsuit in accordance with General Laws Chapter 151B, §9. That is precisely what Reidy did through his counsel by letter dated September 26, 1991. Since that September 26, 1991, letter was sent by first-class mail and was not returned, the inference that must be drawn is that the MCAD received the letter. Following that September 26, 1991, letter requesting a withdrawal so that a private lawsuit could be brought, an exact duplicate of the letter dated September 20, 1991, from the MCAD was received on October 10, 1991.

The fact is that Reidy never wrote a letter to the MCAD, let alone a letter "describing Travelers' alleged discriminatory conduct." The only document ever sent to the MCAD "describing Travelers' discriminatory conduct" was the formal charge signed by Reidy and notarized and mailed by first class mail by Reidy's counsel.

Since the MCAD had never received "a letter from Reidy"

[1] Copies of all the correspondence between the MCAD and the Petitioner are attached to this Reply Brief as Appendix A, B, C, D, and E.

the only reasonable inference that can be drawn is that a formal MCAD charge was received by the MCAD and was either lost by them or not accepted by them. Since Reidy had already decided to pursue his claims of discrimination under General Laws c. 151B, § 9, the form correspondence received from the MCAD was of little or no concern. Reidy's intent was to present a timely charge to the MCAD as required by statute and then to immediately file a lawsuit in court, which is exactly what Reidy did.

"The statutory scheme rejects the administrative law principles of primary jurisdiction and exhaustion of administrative remedies. The filing of a §9 court action requires the MCAD to dismiss without prejudice any complaint pending before it and bars the plaintiff from pursuing the matter subsequently before the MCAD. G.L. c. 151B, §9." *Christo v. Edward G. Boyle Insurance Agency Inc.*, 402 Mass. 815, 817 (1988).

Reidy should not suffer because agents of the MCAD either lost or misplaced the formal charge of discrimination presented to the MCAD on or about August 30, 1991. Under Massachusetts law "proper mailing of a letter is 'prima facie evidence' of its receipt, which means that from proof of mailing alone the jury may but are not required to find receipt." *Commonwealth v. Crosscup*, 369 Mass. 228, 242 (1975).

In fact, the district court, in this case, held that "this Court is required to draw all reasonable inferences in favor of the plaintiff and therefore assumes that he did indeed file his charge with the MCAD on August 30, 1991." Contrary to the District Court holding, the Court of Appeals found as a fact that there was no receipt of a formal charge by the MCAD. The only evidence that is undisputed is that the formal charge was not filed, not that it was not received. It is not required

under Massachusetts law that it be filed, only that a formal charge be presented.

The case of *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021 (1996) supports the Petitioner's position that the MCAD was at fault for losing, misplacing, or refusing "to accept a properly presented timely complaint." Id. at 1022. The undisputed and uncontroverted evidence is that Reidy did present a timely complaint to the MCAD. That was Reidy's only obligation under Massachusetts law. The fact that there is no evidence "to confirm its receipt by the MCAD" is irrelevant under Massachusetts law. If the MCAD refused "to accept a properly presented timely complaint," that would not bar a claim under General Laws c. 151B, §9. *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021, 1022 (1996).

The Complaint of Reidy sworn to under oath and notarized states, in part, that "Reidy (in connection with his claim of discrimination under G.L. c. 151B) complied with all jurisdictional prerequisites prior to instituting this suit."

Weighing all of the evidence and reasonable inferences to be drawn in favor of the nonmoving party, the court had to find that a timely, notarized charge was presented to the MCAD by Reidy and the notarized charge was either lost or misplaced by the MCAD.

There are statements contained in Respondent's Brief that are disputed, material issues of fact. In opposition to summary judgment, Reidy filed an Opposition in accordance with Rule 56.1, consisting of eleven pages with six additional pages of attachments opposing summary judgment. Reidy also filed an affidavit in opposition to summary judgment consisting of fifteen pages with sixteen additional pages of attachments.

Contrary to the assertion in Respondent's Brief at p. 3 that "no record evidence, that the letter was ever sent," the September 20, 1991, letter sent by the MCAD, is conclusive evidence that Reidy did in fact mail a letter and a timely notarized charge to the MCAD.

The case cited at p.3 of Respondent's Brief, *Charland v. Muzi Motors, Inc.*, 417 Mass. 580 (1994), deals with different procedural issues that are not applicable to the essential issues in this case. The cases applicable to the procedural issues in this case are *Christo v. Edward G. Boyle Insurance Agency Inc.*, 402 Mass. 815 (1988) and *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021, 1022 (1996).

The charge filed with the MCAD asserted claims for age and handicap discrimination. Before filing the complaint in the state court, Reidy signed a notarized charge of discrimination for age and handicap discrimination and presented that to the MCAD within six months of the discriminatory acts.[2]

As part of the Decision of the Department of Industrial Accidents, the judge found:

> While it is true that it is not uncommon for individuals to be overworked in their employment, I find that the employee's (Reidy) stressful work environment at Travelers was extreme ... the constant increase in cases, along with the chronic understaffing of his unit placed increased pressure upon the employee (Reidy) which significantly contributed to the stress related symptomatology he began to feel in 1983 and increasingly felt at the time of his departure ... a series of events ... together with the

> employer's (Travelers) inaction with regard to meeting those demands in the form of increased personnel, efficient computer programming and computer equipment significantly contributed to the employee's disability (AI. 127-128).

The judge also found that Reidy had some capacity to work from August 1989 to September 1991 (AI. 125). Instead of providing Reidy a reasonable accommodation between August 1989 and September 1991, Travelers took away Reidy's disability benefits. In a letter dated February 14, 1991, Reidy was told by Travelers that "it has come to our attention that you are currently working as courier ... we will be discontinuing your disability benefits, since you are working for a wage or profit." (AII. 158)[3] The letter also warns that "If you do not choose to return to your position after four weeks ... you will be terminated." (AII. 158).

The February 14, 1991, letter is clearly a sham, since at least as early as November 19, 1990, Travelers knew about Reidy's employment as a courier, knew that Reidy could not return to his original position, and knew that Reidy needed a reasonable accommodation. Reidy asserts in his affidavit that Travelers knew he was working as a courier as early as August 1989 (A. 104-106, portions of Reidy's Affidavit).[4]

In the November 19, 1990, Travelers Memorandum, Dr. Felsenfeld states, "Mr. Reidy works as a courier for a bank in Boston ... I had spoken to Jeanne Erickson this morning and I made her aware of the current situation ... a return to work

---

[2] The charge for discrimination presented to the MCAD is attached to this Reply Brief as Appendix B.

[3] February 14, 1991, letter is attached to this Reply Brief as Appendix F.

[4] Reidy's Affidavit is attached to the Reply Brief as Appendix G.

was needed even if a suitable position had to be created for Mr. Reidy ..." (AII. 153).[5]

In the November 20, 1990, Travelers Memorandum, Dr. Felsenfeld states, "Mr. Reidy should not go back to his previous job as claims supervisor ..." (AII. 153).[6]

Travelers knowingly and wrongfully terminated Reidy's disability benefits against the terms of their own disability policy.

Subsequently, Travelers offered Reidy a position similar to the courier work he was performing for A&S Courier from August 1989 through September 1991. Reidy and his doctor agreed to accept this offer. However, Travelers reneged on that offer and offered Reidy one and only accommodation, a return to the Subrogation Unit, the unit that caused Reidy's "burnout." Reidy had not been in the Subrogation Unit since 1987.

Reidy was not even offered a position in the Auto Damage Unit, a position he held just prior to his going out on disability. The one and only position offered to Reidy was a position in the Subrogation Unit, a position the Travelers knew that Reidy could not perform. Travelers failed to provide Reidy a reasonable accommodation, as required by law and as set forth in their own written policies.

Travelers refused to engage in an interactive process, even though numerous requests were made. Travelers offered Reidy a "take it or leave it proposition."

---

[5] The November 19, 1990, Travelers Memorandum is attached to this Reply Brief as Appendix H.

[6] The November 20, 1990, Travelers Memorandum is attached to this Reply Brief as Appendix I.

Contrary to statements contained in respondent's brief, p.6, par. 1, Reidy was not terminated because Honore knew that he did not have grounds or justification for that type of action. Honore's false allegations would have been exposed and his prior acts of discrimination would have been revealed. Reidy was handling three and a half times the recommended case load as determined in the workers' compensation decision (A1. 30-34).

In spite of their own doctor's opinion, Travelers offered Reidy one and only one position, a position Travelers knew Reidy could not do. By taking away his disability benefits and terminating his employment, Reidy deteriorated to the point that by September 1991, he was totally disabled (AI. 130).

Travelers caused Reidy to become totally disabled by not providing Reidy with a reasonable accommodation between August 1989, through September 1991, when he could have used it. By taking away his disability benefits and terminating his employment of more than twenty years, Travelers violated both Massachusetts law and the federal Americans with Disabilities Act (AI. 97, Reidy began his employment with Travelers in August 1967).

The assertion in Respondent's Brief at p. 11, "that this case presents no federal question," is not accurate.

Article IV of the Constitution requires that federal courts sitting in diversity cases give "full faith and credit ... to the public acts, records, and judicial proceedings ..."

If this case had been presented to a Massachusetts state court, summary judgment would have been denied. The procedural basis upon which the federal District Court

granted summary judgment, and the procedural basis upon which the Court of Appeals affirmed summary judgment, were inaccurate applications of Massachusetts state law.

Contrary to statements contained in Respondent's Brief, p.7, par. 2, Reidy had actual knowledge of discrimination against other older Travelers' employees (A1. 49-53).

Contrary to the statements contained in Respondent's Brief, p.7, par. 2, that Reidy never informed Travelers that he was working, Reidy informed Travelers on many occasions (A1. 55-70).

Contrary to the statements contained in Respondent's Brief, p.7, ft.4, Travelers knew and approved work under substantial guidelines. Travelers was to make periodic requests as to Reidy's status. Reidy provided background information to Dr. Parenty, a doctor he went to at Travelers' request, during his first visit. Subsequently, Dr. Parenty would tell Reidy about conversations he had with Dr. Felsenfeld, Travelers' in-house doctor.

When Traveler's stopped Reidy's disability benefits, Travelers stated that Reidy could not even work one hour for wage or profit as set forth in respondent's reply brief, p. 8, par. 3. Travelers now appears to have changed their position and agree with the definition stated to Reidy, that is, that Reidy could work and still receive disability payments, as long as the work he did was not substantial. See respondent's reply brief, p. 8, par. 1 (A1. 55 and 122).

Contrary to the statements contained in Respondent's Brief, p. 9, par 1., that the courier position proved too much for Reidy, and he quit that position shortly thereafter, Reidy became disabled as a result of Travelers' failure to provide a reasonable accommodation and their abrupt cessation of

disability benefits payments (A1. 105 and 106).

There are other instances of disputed statements contained in Repsondent's Brief. The most significant disputed facts involve Reidy's ability to work from August 1989 to September 1991, and Travelers' failure to provide Reidy a reasonable accommodation at that time. Reidy had work capacity from August 1989 to September 1991, but the cessation of disability payments coupled with his termination from employment at Travelers and their failure to provide Reidy a reasonable accommodation led to Reidy's total disability after September 1991.

The case cited in Respondent's Brief at p. 17, *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992), is not the appropriate case to rely on, not only because of the distinguishing facts, but also because of Massachusetts law. See *LaBonte v. Hutchins & Wheeler*, 424 Mass. 813 (1997).

Under Travelers Sick Leave Plan, as told to Reidy, Reidy could work part time as long as he did not earn more than the money he received from Travelers (AI. 104, ¶55 of Reidy's Affidavit). Travelers own documents support Reidy's understanding (AII. 159, 165).

Contrary to statements made in Respondent's Brief at p. 20-22, loss of consortium and nurture claims arising out of valid employment discrimination may be actionable. The case cited on p. 22, *Mouradian v. General Electric Co.*, 23 Mass. App. Ct., 503 N.E. 2d 1318 (1987), does not stand for the proposition that loss of consortium and nurture claims arising out of employment discrimination may not be brought. In *Mouradian*, there were no valid discrimination claims. There are no Massachusetts cases that hold that claims for loss of consortium and nurture are not available where there are valid discrimination claims under G.L. c. 151B.

Many of the facts stated in Respondent's Brief in Opposition are inaccurate and are disputed by Reidy.

Taking the evidence and the reasonable inferences in the light most favorable to Reidy, these are the established facts:[7]

1. Reidy began working for Travelers in August 1967 as an outside claims reprsentative.

2. From 1967 through 1987, Reidy always received above average annual appraisals.

3. Contrary to the statements contained in Respondent's Brief at p. 5, footnote 3, Reidy and his supervisor did not disagree "about the quality of his work" nor was Reidy placed on probation by his supervisor in 1978.

4. The administrative judge of the Department of Industrial Accidents ("DIA") found that Reidy began having symptoms in 1983. His symptoms became progressively worse (AI. 124).

5. Travelers was responsible for causing Reidy's disability according to the Decision of the DIA.

6. When Reidy was ready to return to work, Travelers failed to provide a reasonable accommodation or to engage in an interactive process. Travelers said take it or leave it.

7. When Reidy went out on disability, he was in the Auto Damage Unit, not the Subrogation Unit where Reidy became "burned Out."

8. When Reidy was ready to return to work, the one and only job offered to him was a position in the Subrogation

[7] Reidy's Affidavit attached as Appendix G.

Unit (He had not been in the Subrogation Unit since 1987).

9. Reidy was not offered a position in the Auto Damage Unit, the last place he worked prior to his disability.

10. Reidy provided evidence that he was replaced by a younger person when he was transferred to the Auto Damage Unit and replaced by a younger person in the Auto Dsamage Unit when he went out on disability in September 1988.

11. Even though Travelers knew that Reidy could not return to the Subrogation Unit but could return to other work, the job in Subrogation was the one and only position offered.

CONCLUSION

For the reasons cited in the Petition and in this Reply Brief and to prevent a miscarriage of justice, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, and to direct that Court to submit the questions concerning Massachusetts law to the Supreme Judicial Court for the Commonwealth of Massachusetts for their interpretation of Massachusetts law.

Respectfully submitted,

Frederick T. Golder
BBO NO: 198580
BERNSTEIN, GOLDER & MILLER, P.A.
230 Broadway, Suite 104
Lynnfield, MA 01940
(617) 592-4000
Counsel for Petitioners

APPENDIX A - LETTER FROM FREDERICK T. GOLDER TO MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, DATED AUGUST 30, 1991.

Bernstein, Golder & Miller, P.A.
Attorneys at Law
Lynnfield Woods East
230 Broadway - Suite 104
Lynnfield, MA 01940-2383
Telecopier (617) 599-8980
617-592-4000

August 30, 1991

Massachusetts Commission Against Discrimination
1 Ashburton Place, 6th Floor
Boston, MA 02108

RE: George F. Reidy v. The Travelers Companies

Gentlepersons:

Enclosed please find Charge of Discrimination in the above.

Kindly file same and take appropriate action thereon.

After the employer has filed the petition statement, please send a withdrawal form, so that the same may be filed in court.

Thank you.

Yours very truly,

Frederick T. Golder

FTG:sl
Enclosure

APPENDIX B - CHARGE OF DISCRIMINATION SIGNED UNDER OATH BY GEORGE F. REIDY, SUBMITTED WITH THE LETTER DATED AUGUST 30, 1991

CHARGE OF DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and EEOC
(State or local agency, if any)

NAME (indicate Mr., Ms., or Mrs.)	TELEPHONE NUMBER (Indicate Area Code)
Mr. George F. Reidy	508-842-3514

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
46 Browning Road	Shrewsbury, MA 01545	Worcester

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below)

NAME	NO. OF EMPLOYEES	TELEPHONE NUMBER (Indicate Area Code)
The Travelers Companies	in excess of 100	508-751-4200

STREET ADDRESS	CITY, STATE AND ZIP CODE
120 Front Street	Worcester, MA 01608

NAME	TELEPHONE NUMBER (Indicate Area Code)
STREET ADDRESS	CITY, STATE AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON (Check appropriate boxes)	DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, year)
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATL ORIGIN ☐ AGE ☐ RETALIATION ☐ OTHER (specify) Handicap	March 12, 1991

THE PARTICULARS ARE (if additional space is needed, attached extra sheet(s))

I began my employment with the Travelers Companies in August 1967. I was employed as a supervisor in the claims department. On or about September 6, 1988, as a result of a series of stressful events and harassment, I went out on disability, and have been unable to return since that time.

I was placed on disability benefits. When I went out on disability, the plan and policy to my knowledge and understanding was that I could receive disability

payments, as long as I did not receive income that exceeded the disability payments.

The people at Travelers knew that I was receiving some minor income that was less than my disability payments, because I informed them of that fact.

I was informed much later, almost two years later, that the plan or policy had been changed, and I was informed that since I was receiving any income, that I was not entitled to receive any benefits under the Sick Leave Plan.

I believe that the harassment was because of my age, and that they wanted to force me out.

As a result of all of the harassment, I now have a serious impairment that constitutes a handicap.

The company is now planning to take away my benefits.

I believe that this action has been taken against me because of my age (d.o.b.: July 20, 1941), and that this discrimination is ongoing, and that in addition, that they are discriminating against me because of my handicap as well.

I therefore charge the Travelers Companies with age and handicap discrimination in violation of General Laws c.151B and General Laws c. 93, §103.

NOTARY
/S/_____
Frederick T. Golder

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

/s/ George F. Reidy

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)
30 / 8 / 91

APPENDIX C - FORM LETTER TO MR. GEORGE F. REIDY FROM LUTHER E. ALLEN, JR. OF THE COMMONWEALTH OF MASSACHUSETTS AGAINST DISCRIMINATION, DATED SEPTEMBER 20, 1991.

The Commonwealth of Massachusetts
Commission Against Discrimination
1 Ashburton Place, Boston, MA 02108

Administrative Services: 727-3990
September 20, 1991

Mr. George F. Reidy
46 Browning Road
Shrewsbury, MA 01545

RE: Reidy v. The Travelers Companies

Thank you for your letter outlining your allegations of discrimination. This information may prove very useful in helping the Commission to understand your claim.

However, the Commission's rules require that you must file a formal complaint in order for us to have the power to act further on your claim. Before we can take your complaint and begin an investigation, a Commission representative needs to meet with you to discuss your situation further.

To discuss your case, come to the Commission's office at any time, Monday through Friday, from 9:00 a.m. to 4:30 p.m. Enclosed you will find a brochure that will explain to you how the procedures at the Commission work.

I look forward to meeting you, and hope that I can be of some service to you.

Sincerely,

Luther E. Allen, Jr.
Compliance Officer

cc: Frederick T. Golder, Esquire
Bernstein, Golder & Miller, P.A.
230 Broadway - Suite 103
Lynnfield, MA 01940-2383

APPENDIX D - LETTER FROM ATTORNEY GOLDER DATED SEPTEMBER 26, 1991, TO MR. LUTHER E. ALLEN, JR.

Bernstein, Golder & Miller, P.A.
Attorneys at Law
Lynnfield Woods East
230 Broadway - Suite 104
Lynnfield, MA 01940-2383
Telecopier (617) 599-8980
617-592-4000

September 26, 1991

Luther E. Allen, Jr.,
Compliance Officer
Massachusetts Commission
Against Discrimination
One Ashburton Place
Boston, MA 02108

RE: Reidy v. The Travelers Companies

Dear Mr. Allen:

I would appreciate your sending a copy of the Employer's Position Statement, and also a Withdrawal form, so that a private lawsuit may be brought.

Thank you.

Yours very truly,

Frederick T. Golder

FTG/sl

APPENDIX E - SECOND FORM LETTER TO MR. GEORGE F. REIDY FROM LUTHER E. ALLEN, JR. OF THE COMMONWEALTH OF MASSACHUSETTS AGAINST DISCRIMINATION, DATED SEPTEMBER 20, 1991, IDENTICAL TO FIRST FORM LETTER AND SENT AFTER ATTORNEY GOLDER'S SEPTEMBER 26, 1991 (APPENDIX D).

The Commonwealth of Massachusetts
Commission Against Discrimination
1 Ashburton Place, Boston, MA 02108

Administrative Services: 727-3990
September 20, 1991

Mr. George F. Reidy
46 Browning Road
Shrewsbury, MA 01545

RE: Reidy v. The Travelers Companies

Thank you for your letter outlining your allegations of discrimination. This information may prove very useful in helping the Commission to understand your claim.

However, the Commission's rules require that you must file a formal complaint in order for us to have the power to act further on your claim. Before we can take your complaint and begin an investigation, a Commission representative needs to meet with you to discuss your situation further.

To discuss your case, come to the Commission's office at any time, Monday through Friday, from 9:00 a.m. to 4:30 p.m. Enclosed you will find a brochure that will explain to you how the procedures at the Commission work.

I look forward to meeting you, and hope that I can be of some service to you.

Sincerely,

Luther E. Allen, Jr.
Compliance Officer

cc: Frederick T. Golder, Esquire
Bernstein, Golder & Miller, P.A.
230 Broadway - Suite 103
Lynnfield, MA 01940-2383

APPENDIX F - FEBRUARY 14, 1991, LETTER FROM JEANNE E. ERICKSON OF THE TRAVELERS TO GEORGE F. REIDY

The Travelers

Jeanne E. Erickson
Special Assistant
Personnel - Administration Dept.
Worcester Office

The Travelers Companies
People's Bank Building
120 Front Street
Worcester, MA 01608-1435

February 14, 1991

Mr. George F. Reidy
46 Browning Road
Shrewsbury, MA 01545

Dear George:

In a recent conversation I have had with you and in a discussion, Dr. Felsenfeld of our medical division had with your physician, Dr. Moretti, it has come to our attention that you are currently working as a courier for a bank in Boston. In light of this information I would like to bring to your attention page 64 of Planned Protection.

Effective March 4, 1991, we will be discontinuing your disability benefits, since you are working for wage or profit. Your position at the Travelers remains open and you will be considered on unpaid leave starting March 4, unless you return to work on that date.

We will be able to continue you on unpaid leave for up to four weeks. If you do not choose to return to your position after four weeks, it will be considered that you do not wish to return and you will be terminated.

Please contact me at 751-4201 if you have any questions or if you have additional information for consideration on your return to work.

Sincerely,

Jeanne E. Erickson
Corporate Human Resources
Home Office
1 Tower Square
Hartford, CT 06183

APPENDIX G - AFFIDAVIT OF GEORGE F. REIDY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO: 91-40154-NMG

****

GEORGE F. REIDY, ET AL., *
Plaintiff, *
*
v. *
*
TRAVELERS INSURANCE CO., *
Defendant. *

****

AFFIDAVIT OF GEORGE F. REIDY

1. My name is George F. Reidy. I am making these statements of my own personal knowledge and belief.

2. I began my employment with the Travelers Insurance Company in August, 1967, as an Outside Claims Representative.

3. As a result of my professional competence and performance, I was promoted to Assistant Supervisor of the P.I.P. Unit in 1971.

4. As a result of my professional competence and performance, I was promoted to Supervisor and Unit Head of the Subrogation Unit in 1973.

5. From 1967 through 1987, I always received above-average annual appraisals.

6. From 1967 through 1971, as an Outside Claim Representative, I was managed by Mr. Weikniak and Mr. Guinan. During that period of time I received excellent appraisals and excellent annual raises. From 1971 through 1973, when I was assistant supervisor of the P.I.P. Unit, I was managed by Mr. Smith and received above-average annual appraisals. From 1973 through 1985, while I was the unit head and supervisor of the Subrogation Unit, managed by Mr. Smith, I always received above annual appraisals, but most of my annual salary increases were only average at best.

7. While I was head of the Subrogation Department in 1973, until 1985, the department never missed the year end major goal, and the Subrogation Unit always had excellent results.

8. Some of my annual appraisals were changed after I signed them. I was receiving above average appraisals but was only receiving average or below average annual salary increases during the period from 1973 through 1985.

9. I have a copy of an appraisal change on my appraisal of June 4, 1984, where the appraisal was fraudulently altered after being signed.

10. My manager Mr. Smith would usually refuse to give me copies of my final annual appraisal, and the reason for that was that he changed the appraisals without my knowledge, after I signed them.

11. During the period 1975-1976, my manager, Mr. Smith wanted me to handle the monthly statistics for the Worcester Claim Department, and he gave me many documents from previous years to familiarize myself with the information. Months later, after I reviewed these volumes of documents, I questioned him on all the changes of results and the notations in the margins. He was changing many of the statistics to surpass goals for monthly and yearly totals. I confronted Mr. Smith about the alterations, and he told me that I would not be considered for the additional duties.

12. In July 1977, Manager Smith accused me of being involved in alleged phone threats he had received. Later in the day, he told me he had made a mistake and gone too far. It is my belief that he wanted me to lose my temper, have a physical confrontation, and then terminate me for assaulting him. I would have been fired only weeks before my tenth anniversary. When you have been with Travelers for ten years, you get additional rights and benefits. It amounts to a tenured position, and it then requires Travelers to go through a special process before you can be terminated.

13. In September 1978, Manager Smith attempted to force me to lower an evaluation of a subordinate supervisor, Thomas Holden. When I refused, Mr. Smith threatened me with retribution.

14. In November 1978, I and two other supervisors applied for an available and posted position in the Commercial Lines Department. These available positions were recommended by Travelers for career advancement. When I advised Mr. Smith of my plans, he stated that I could not apply for the position, because he was placing me on probation. There was absolutely no basis for

placing me on probation. I had an attorney write a letter to Travelers complaining about the treatment, and Travelers quickly remedied the situation and allowed me to apply for the position. I, of course, did not receive the position, and I continued to remain in the Claims Department under the supervision of Mr. Smith.

15. In the summer of 1981, during my evaluation review, Mr. Smith stated he would put me against the wall. When I asked him literally or figuratively he stated he would make me quit by improper and inadequate staffing of the Subrogation Unit.

16. In the summer of 1984, during my evaluation review, Mr. Smith repeated that he would make me quit by improper and understaffing of the Subrogation Unit.

17. In 1983, Travelers consolidated the Springfield, Massachusetts Office with the Worcester, Massachusetts Office. Our office received approximately another 40% more files. Mr. Smith gave us no instructions on how to implement this consolidation. When we requested assistance or instructions, he refused to provide any guidance, advice or assistance.

18. In 1984, Travelers converted all their files onto a computer system. When this new system was implemented, it eventually resulted in many major deficiencies. This entire conversion process was completed by Home Office, and the Control Units processed the manual files. The Subrogation Unit had no involvement n this conversion process.

19. While I was the unit head of the Subrogation Unit during 1973 through 1985, with Mr. Smith as the Manager, he would frequently do a number of things to harass me. He would not invite me to unit head meetings. If he was to change personnel in the Subrogation Department, he would not inform me until after it was done. He would wait until I went on vacation and then make the changes. I would return from my vacation to find personnel changes had been made in my absence. In the fall of 1985, Mr. Smith just walked out at lunch one day and never returned after many years of employment with Travelers and including 14 years in the Worcester office. No good-byes, no retirement parties, nothing.

20. In October 1985, John Honore was made the new Claims Manager. I informed Mr. Honore about the major problems in the Subrogation Department and about major understaffing. The unit head and claims representative should have had approximately 1200 files. In August of 1987, when I was demoted, there were only two people handling 3800 files. The

computer system malfunctioning. The diary system was inconsistent and working sporadically. The recovery figures were completely inaccurate.

21. In 1986, the unit recovered 2.7 million dollars with almost 2.2 million being collision recovery. We received credit for approximately $600,000.00 and allegedly missed our goal by $13,000.00. This was completely improper, since we clearly surpassed our goals. The figures were deliberately manipulated to make it look as if I missed the goals. The low and false figures provided to the Commonwealth of Massachusetts would greatly alter their rating figures. Therefore, the accurate high recovery figures were never submitted to the Commonwealth of Massachusetts. Millions of dollars were hidden from the Commonwealth of Massachusetts.

22. Mr. Honore completely ignored my warnings and completely ignored the problems I discussed with him.

23. Mr. Honore rarely reviewed collision, liability, or property files in the twenty-two months as a manager. He did review some workers' compensation files.

24. In January 1987, I returned from a family vacation in California. Mr. Honore accused me of not telling him I was going for two weeks for Christmas, to California. I had made the request weeks and weeks ago, and it had been approved weeks and weeks before. Mr. Honore had approved my vacation salary advance in writing weeks before, so he knew about my vacation plans.

25. Mr. Honore was extremely angry with me and said that, "It would have been better if I missed my goal by $250,000," rather than the approximate $10,000.00, which was actually not an accurate amount. I told Mr. Honore that I tried to recover as much money as possible, and that the recovery figures were wrong, and if they were tabulated correctly, I would have easily surpassed the goals. We discussed the goals, and he said that he would do anything, even lie, to achieve the goals set for us. I told him that I could make goal any time by falsifying figures, but why be dishonest.

26. I told him about computer problems, understaffing, and incorrect recovery figures. I asked him how many files I should have, and he answered, "How many do you have?" When I replied, approximately 1500 files, he said, "Then that's what you should have."

27. I advised Mr. Honore of problem areas with respect to proofs.

28. In late August 1987, I went away on vacation and when I returned I was

relieved of my duties as Unit Head Supervisor of the Subrogation Department in the Worcester Office, without any valid reason or explanation, and was assigned to the Auto Damage Unit performing the function of a claims representative. Although this in reality was a demotion, I did not lose my title or salary, but I did not receive raises I should have received.

29. I had received an above-average evaluation on June 7, 1987, and was supposed to receive my annual performance raise on my employment anniversary, August , 1987. However, I did not receive a raise, even though the so-called "alleged deficiencies" were not discovered until late August 1987. In light of the horrendous working conditions of understaffing, computer problems, and falsification of recovery amounts, there were relatively few deficiencies.

30. I told Mr. Honore that he was intentionally trying to set me up to be fired.

31. My Subrogation Assistant, Dick Wackell ("Wackell"), told me that upon my return from my 10 day vacation, that the day I went on vacation, Mr. Honore was all over the Subrogation Department, checking my files.

32. Mr. Honore sent me a letter in late August 1987, outlining the reasons for my transfer. He claimed that I took long lunches, long coffee breaks, eating at my desk, and having 150 files in which he thought the statute of limitations had run. Mr. Honore was incorrect with respect to most of his allegations.

33. In late August 1987, Mr. Honore transferred me to the Auto Damage Unit, the worst assignment in the Claims Office.

34. After I was demoted to the Auto Damage Unit in August 1987, Travelers added staff, appointed a 38 year old manager, gave him an Assistant Manager title, and added Subrogation from other offices. Workers in the Subrogation Unit now handle approximately 500 files per person, while we had 3800 files for two people.

35. I was assigned to be under the direct supervision of a supervisor by the name of Terry Stachura ("Stachura"), someone who was formerly a subordinate of mine in the Subrogation Department.

36. In early September 1987, Ms. Stachura stated to another Supervisor, Charlie Casey ("Casey"), that I should be placed on probation.

37. From the very beginning of my employment in the Auto Damage Unit, I received an entire and full case load, even though in my 18 years at the Claim Department, I had never directly handled this type of claim.

38. I received only minimal help from Ms. Stachura. She rarely initiated any advice or help regarding auto damage claim handling and mechanics of file handling. Even when I asked for help, I rarely received the help I needed.

39. Although I requested help, I received minimal help from Stachura and very rarely received any advice from her regarding auto damage claim handling, and the mechanics of handling the files.

40. When I went out on my regularly scheduled vacation or was out sick, no one, including Stachura, ever did any more than minimal work on my files. This meant that when I came back from vacation or a sick day, my work when I returned was substantially more than when I left.

41. During the period that I was assigned to the Auto Damage Unit, I received approximately 50-60 telephone calls each day, and of those calls, 5-10 calls would be in reference to files in the Subrogation Unit, which I formally used to handle.

42. Although I requested that the problems regarding responsibility codes be changed, no changes were ever made, and the problems and situations were never rectified.

43. In August 1988, Mr. Honore and Assistant Manager of the Auto Damage Unit, Harold Miller ("Miller"), discussed placing me on final warning.

44. On September 6, 1988, I went out on sick leave, because I could no longer continue to cope with the excessive demands.

45. Mr. Conway, Mr. Smith, and Mr. Honore intentionally and systematically allowed certain departments in the Worcester Claim Office to be severely understaffed. It was their intention that people would become so frustrated with the excessive caseloads and the deplorable and extremely stressful work environment, that they would quit.

46. However, if the employees stayed, their work load was so heavy and demanding, that they would be vulnerable to quality file critiques. The work load was so heavy and demanding, that as a necessity, the work product would be of a much lesser quality.

47. Four other Travelers' employees between the ages of 47 to 64, besides me, were exposed to varying degrees of harassment. Charles DeWaele was forced to retire because of the excessive job demands. Frank Foley was forced out because of excessive job demands and went to another insurance company.

Thomas Holden sued Travelers for age discrimination. Richard Wackell, because of the excessive work demands, was forced out and went to another insurance company.

48. These four individuals had many years of insurance experience and expertise, and the only way to decrease the quality of their work product was to give them intentionally excessive case loads.

49. The Travelers' Claim Department pressured older employees for the purpose of trying to force them out.

50. There was a younger liability unit head who was completely swamped with work, understaffed, and considerably behind in his work. This individual would come to work after more than 2 hour lunches, and at least twice a week, would be staggering drunk. Although Mr. Honore had full knowledge of this situation, no action was taken, and when I was forced out in 1988, this individual was still working at Travelers.

51. Travelers intentionally and systematically caused me to have excessive case loads, had understaffing, and created a stressful work environment designed to force me out.

52. The case loads given to me in the Subrogation and Auto Damage Units were extremely heavy and demanding.

53. Based upon my background and experience in the insurance industry, the work load given to me in the Subrogation and Auto Damage Units was so heavy and excessive, that no one ordinary person could perform the work in a completely successful manner.

54. Of the six former Travelers employees who were most directly related to setting me up to be either terminated or forced out of the company, these former Travelers employees have since been relieved of their duties, forced to retire, or voluntarily retired from Travelers.

(a) Mr. James Smith, my manager from 1971 through October 1985, was forced to retire under pressure.

(b) Kirby Conway, North East Regional, was demoted shortly after an incident involving me in 1988, and he was relieved of his duties a few months later.

(c) Worcester Manager, Mr. John Honore, who managed me from October 1985, to September 1988, was relieved of his duties under pressure.

(d) Terry Stachura, my immediate supervisor from September 1987 through September 1988, and was forced to retire.

(e) Mr. Harold Miller, my Assistant Manager of Auto Damage Unit from September 1987 through September 1988, was forced to retire.

(f) Jean Erickson, Personnel Manager for Travelers in the Worcester Office was relieved of her duties.

55. In May 1989, on two occasions, I spoke with Joan Lawson, Benefits Coordinator for Travelers in Hartford. She outlined to me the guidelines on how I was to proceed with alternative employment. I provided her with my work history and medical background. She advised me that "substantial" means that I could not earn in a year more than the money I received from Travelers. She even indicated to me that if I earned a little more, it would not be a problem. However, when I asked for a ball park figure, she said it would be best to stay at the same income level as benefits received from Travelers.

56. I was doing everything I could do to get back into the work force to eventually return to work at Travelers.

57. I was also told that I would receive yearly inquiries from Travelers regarding my earnings and cost of living factors after five years.

58. On August 1, 1989, I started working at A&S Delivery, Main Street, Ashland, MA working as a courier for $7.25 per hour, and was making approximately $300.00 per week.

59. Going to work as a courier was part of my therapy to get me back working, and eventually return to work at Travelers.

60. If Travelers allowed me to work as a courier, I probably would have been able to return to work at Travelers.

61. On September 15, 1989, I began treatment with a Travelers insurance doctor, psychiatrist, Dr. Roy Parenty, from Worcester. Dr. Parenty treated me with Prozac, Pamelor and Inderol. I suffered severe side effects, especially from Prozac. Although I felt much better in the morning, it altered my mind, so that I no longer felt brain dead, I had two automobile accidents and numerous near misses and near accidents. I fell asleep at the wheel. Prior to this, I had not had an automobile accident in approximately 25 years. I also had suicidal thoughts and tendencies with erratic and violent behavior from the Prozac. The Pamelor made me very irritable and tense.

62. In August 1990, Travelers denied their involvement with Dr. Parenty, after I had been treating with him for almost a year. I never paid Dr. Parenty for any of his treatments. Travelers paid all of his bills. Although Travelers tried to say that Dr. Parenty was my doctor, he was not my doctor, and there is no way I would have chosen him to be my doctor. He was their insurance doctor and had many very serious personal problems. He had many suits regarding abusing patients. I saw some newspaper clippings that support those allegations. Dr. Parenty told me that my disability checks would stop if I discontinued treating with him. On one occasion, he was about to write to Travelers home office to stop my disability checks because I mistakenly went the wrong day to an appointment with him. I provided much information regarding my work habits, medical problems, and background facts to Dr. Parenty who provided that information to Travelers.

63. Dr. Parenty knew that I was working at A&S Delivery from my very first visit, because I was wearing an A&S uniform. Dr. Parenty questioned me about my work, and all of my future visits with him were arranged around my work schedule.

64. Dr. Felsenfeld, Associate Medical Director at Travelers was in constant contact with Dr. Parenty regarding my progress and background facts that I was telling to Dr. Parenty. Dr. Parenty frequently referred to what he and Dr. Felsenfeld had discussed. From the very beginning, on September 15, 1989, Travelers knew I was working.

65. Dr. Parenty would ask me questions about James Smith, my former manager. Dr. Parenty had treated a family member of Mr. Smith. Dr. Parenty knew I did not get along with Mr. Smith. Given these facts, Dr. Parenty would be the last doctor I would pick if I had a choice.

66. Dr. Felsenfeld had advised Dr. Parenty who advised me that I would be going on welfare if I did not get better and get back to work.

67. I treated with Dr. Parenty on 9/15/89; 10/17/89; 11/3/89; 12/8/89; 1/12/90. Dr. Parenty was out sick, and then I had additional treatments on 5/11/90; 6/22/90; and 7/27/90.

68. On August 7, 1990, Dr. Felsenfeld, Associate Medical Director at Travelers at Hartford, advised me that I did not have to continue treating with Dr. Parenty.

69. Up until that time I was told that I had to treat with Dr. Parenty if I wanted to receive disability benefits.

70. On August 3, 1990, I spoke to Jean Erickson, Worcester Personnel Director for Travelers, and she was advised directly on the telephone regarding the particulars of my work at A&S Delivery. She told me that she was going to research Social Security benefits for me. She told me that she would write to me about Social Security Disability. She also discussed with me the mechanics for applying for total disability benefits, which would do away with yearly medical examinations.

71. On May 2, 1990, I received a letter from Ms. Erickson requesting a medical update from Dr. Moretti.

72. On November 5, 1990, Dr. Felsenfeld sent a letter to me advising me that I was expected to return to work on November 19, 1990, to perform light duty work per the letter of Dr. Moretti.

73. On November 12, 1990, I had a discussion with Dr. Moretti, and he advised me that I could do stress free work like the delivery or courier work I was performing for A&S Delivery. It was his opinion that I could do similar courier work for Travelers. However, he stated to me that he definitely did not want me to return to my former very stressful work, and he also told me that he would clarify all of this with Dr. Felsenfeld, the Travelers in-house doctor.

74. On February 14, 1991, I received a letter from Ms. Erickson stating recently that they learned I was working, and therefore effective March 4, 1991, my disability benefits would be discontinued, and I would have four (4) weeks of unpaid leave. The letter sent by Ms. Erickson was false, in that Travelers knew I had been working some 18 months earlier.

75. I was working as a courier as part of my therapy in order to get well enough to return to my regular job at Travelers or some comparable job.

76. On March 7, 1991, I had a three-way telephone conversation with Ms. Erickson, and Charles R. Shaw, of the Home Office Corporate Benefits regarding my disability benefits. It is my opinion that this phone conversation was taped by Mr. Shaw. I discussed with him the conversations I had with Ms. Lawson regarding her approval of my working. They continued to say that they just found out I was working. Mr. Shaw chided me several times telling me that I did not want to return to work. I told him that I did want to return to work, but medically, I could not return to work in the same stressful environment. I told him I could return to work, but as a courier. Mr. Shaw then said he would have Ms. Erickson send a letter outlining my return to work, and if I did not return to work, I would be terminated, on March 18, 1991.

77. Although Travelers allegedly claims that I was not entitled to be working while receiving disability benefits, this is clearly false because Travelers never asked for any reimbursement for the disability benefits payments made to me.

78. In the past, when Travelers made any overpayment of anything, no matter how small, Travelers would always request and receive the money back. They did not do that in this case.

79. I received disability benefits payments from September 1988 through March 25, 1991.

80. The only reason Travelers paid me disability benefits payments while I was working was to try and wait for the statute of limitations to expire regarding discrimination.

81. On March 12, 1991, I received a letter from Ms. Erickson advising me to return to work, or be terminated four (4) weeks after March 15, 1991, when my benefits would be discontinued.

82. On March 28, 1991, I received a letter from Ms. Erickson stating that my disability was discontinued on March 25, 1991, and that I would be terminated in four (4) weeks, if I did not return to work.

83. On April 13, 1991, I sent a letter to Ms. Erickson requesting unpaid leave until June 1, 1991.

84. On April 17, 1991, I spoke to Ms. Erickson and she said she had not received my letter but would check with Mr. Shaw and contact me.

85. On April 19, 1991, I received a telephone message from Ms. Erickson that she or Mr. Shaw could not make a decision on my extension, that the person who would be making the decision was unavailable. I then received a message on my answering machine that I had received an extension until June 1, 1991.

86. On May 22, 1991, I sent another letter requesting an extension until September 1, 1991.

87. On May 23, 1991, I spoke with Ms. Erickson and advised her of my request for an extension to September 1, 1991. She told me that she would contact the home office right away. I advised her that I had to know as soon as possible regarding my coverage. She said she would get back to me as soon as possible. I never did receive the first letter of extension that they said they would provide to me.

88. On May 24, 1991, I left a message for Ms. Erickson to contact me as soon as possible. I never did receive any written or verbal communication from Travelers regarding this second extension.

89. Although I requested from Travelers that I be reemployed as a courier or some other less stressful position, Travelers refused to provide any accommodation, and refused to allow me to return in any capacity, other than as a Claims Representative, the position which caused me to become disabled in the first place.

90. Although Travelers claims they terminated me on June 1, 1991, Travelers never gave me notice under COBRA benefits.

91. Jean Erickson, personnel director at Worcester, continuously lied to me about my benefits, would not tell me information I requested, like social security, working while receiving disability benefits, the alleged changes in the disability plan.

92. Ms. Erickson held a check for weeks that I should have received.

93. Ms. Erickson denied knowing I was working when she knew I was.

94. I have just recently received workers' compensation benefits. A copy of the decision granting me benefits is attached to this affidavit.

95. I have read the Travelers Statement of Undisputed Facts, and I dispute many of the facts.

96. In a memo from Travelers' Medical and Law Department dated 11/19/90 and 11/20/90, Dr. Felsenfald stated "a return to work was needed even if a suitable position had to be created for Mr. Reidy." "...some simple type of work that needed to be done such as distributing claim files. This would have a reasonable accommodation, but Travelers never did offer anything, other than going back to the job I got sick on.

97. After ten years with Travelers you become tenured, and you cannot be terminated without good cause. I know this because I was a supervisor. No one was terminated at Travelers after 10 years unless there was a good cause. Furthermore, when someone was terminated they would receive severance pay.

98. Travelers did not offer every opportunity to return to work. In fact, Travelers offered no reasonable opportunity to return to work.

99. There were changes in the Disability Plan, contrary to the statement of Travelers.

100. I filed a timely charge with the MCAD, that is, I filed a charge within six months after I was terminated with the MCAD, and it appears although they received the charge, MCAD lost it or misplaced it. Furthermore, the acts of Travelers in concealing their discrimination, led me to hold off on filing the charge of discrimination until 1991. Also, I was mentally impaired from September 1988, and still am mentally impaired.

101. The most serious discrimination occurred from 1981 on, particularly intentionally understaffing the Subrogation Unit to force me to quit.

102. I did not refuse to return to work. Travelers refused to provide a job I could do.

103. I was capable of working from August 1989 to September 1991, but Travelers refused to allow me to return to a suitable job.

104. There were jobs available at Travelers that I could have done. I was never offered one I could do.

105. The reason I could not work after September 1991 was that my condition deteriorated because I was terminated without any reason, and Travelers refused to provide a job I could do. The termination was devastating to me. Travelers caused me to be totally disabled to the present time.

106. I became totally disabled because of what Travelers did to me (they terminated my employment and all my benefits) and what they failed to do, namely, not providing me with a job I could do.

107. I needed to work in a less stressful environment, not a stress-free environment. Travelers refused to provide a less stressful environment.

108. I was never placed on probation.

109. Mr. Smith never disciplined me. He harassed me and threatened to get me to quit or force me out.

110. Mr. Honore told me Mr. Wackell should not be hired because he was too old and he had moved around too much.

111. I did not have a good working relationship with Mr. Honore from 1985-1987.

112. While Mr. Smith failed to force me out before he was forced out, he made my life and work at Travelers miserable, and when he left, the unit was sin terrible shape, and I was very sick by then and getting worse.

113. While Mr. Honore criticized me for taking long and excessive coffee breaks, long lunches, and making personal phone calls, this was not true, and Mr. Honore knew his allegations were false. During my employment with Travelers, I frequently worked after business hours and/or took work home to try and complete the horrendous work load at Travelers.

114. I was not terminated in 1987 because there was no valid reason or grounds. I was not a manager, I was a supervisor, and I did not receive a pay increase I should have received.

115. I was never given a reason for my transfer at the time. After my transfer, I requested a letter asking for the reasons. It was only then that Mr. Honore made up many reasons that were false and that he knew were false.

116. Harold Miller and Terry Stachura were not out to get me, they just refused to give me needed assistance because they were afraid of Mr. Honore.

117. Mr. Honore did not go by Travelers guidelines. He told me if my performance did not improve in 60 days, he would put me on final warning. Much more than 60 days went by with no input from Mr. Honore. I was working as hard as I could, and then he hit me with a bombshell that I was put on final warning and unless I improved within 60 days, I would be terminated. This was devastating to me.

118. I know of at least four instances where employees were discriminated against because of their age: Mr. Wackell; Mr. Holden; Mr. Foley; and Mr. DeWAele. I believe there were others. Very few employees in Worcester ever retired at a normal retirement age.

119. The actions of Travelers caused me to become disabled. If they gave me the support I needed, I would still be working, if not in the old job, in some job. I was working well at the courier job until Travelers fired me.

120. Dr. Parenty was not an independent medical examiner. He was specifically retained by Travelers to allegedly treat me. He prescribed medication the first day I saw him. I had no choice. He set up a treatment plan to follow. If I did not do this, my disability payments would stop, and I would lose all my employment benefits and would have been terminated from employment.

121. Travelers wanted to return me to the unit that caused my disability.

122. I was told that I could work and still receive disability benefits payments, as long as the money I received did not exceed what I received from Travelers, and it did not. That is how she defined "substantial" to me.

123. The courier position at A&S was not the problem. The problem was how Travelers treated me.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 3RD DAY OF August 1995.

/s/ George F. Reidy

APPENDIX H - THE TRAVELER'S MEMORANDUM DATED NOVEMBER 19, 1990, CONCERNING GEORGE F. REIDY

THE TRAVELERS MEMORANDUM

DATE: 11/19/90

TO: File

RE: George F. Reidy, SS# 025-36-2518

NOTE TO FILE

Mr. Gray Gagne (4-5098), called re: George Reidy. I told Mr. Gagne that I had spoken with Dr. Moretti and Jean Erickson and I told them that I had written to Mr. Reidy, requesting that he return to work on 11/1/90, to a light-duty position. I told him that Dr. Moretti had no objections in view of the facts that Mr. Reidy works as a courier for a bank in Boston. I told Mr. Gagne that I had spoken to Jean Erickson this morning and I had made her aware of the current situation. I told her that Mr. Reidy should return to light duty. He could half-time and half-pay or full time and full pay at light duty. I told Mr. Gagne that the committee on Long Term Disability and Attny. Richard Fortier were anxious to have Mr. Reidy returned to work. I told Mr. Gagne that light duty was a difficult term to define except where heavy lifting was involved, in which case there would be a work restriction on lifting. I told Mr. Gagne that a return to work was needed even if a suitable position had to be created for Mr. Reidy. I told Mr. Gagne that we have to be flexible about this situation and that we have to try to get Mr. Reidy to return to work for Travelers.

Herbert W. Felsenfeld, M.D.
HWF/tmg

APPENDIX I - THE TRAVELERS MEMORANDUM DATED NOVEMBER 19, 1990, CONCERNING GEORGE F. REIDY

11/20/90

NOTE TO FILE

I met with Mr. Fortier (Law Dept.), and I discussed the question of light duty in this case. he said that there was no legal definition. Mr. Reidy should not go back to his previous job as a claims supervisor since it was too stressful. He suggested that Jeanne Erickson and the people in the Worcester office should look for some simple type of work that needed to be done, such as distributing claim files. I told him of my conversations with Dr. Moretti and Jeanne Erickson. Dr. Moretti was under the impression that Mr. Reidy would work as a courier at Travelers. This impression must have been based upon the fact that he was performing this type of work for a bank in Boston. I told Mr. Fortier and Jeanne Erickson that I had not suggested that such a position was available at Travelers.

I told Jeanne Erickson that Mr. Fortier and Mr. Gagne were available for consultation in this matter. I told her that Mr. Reidy could work one-half time at one-half pay or full time at full pay in a light duty job, depending on his preference. I told her that it would be very advantageous to have Dr. Moretti's approval of the job description once it had been (con't. 11/20/90)

RE: George F. Reidy
Job at the Present.

Once the job had been outlined and approved by Dr. Moretti, Mr. Reidy should be given a copy of the job description and notified of a specific return to work date.

Herbert W. Felsenfeld, M.D.
Hwf/tmg